No. 93-643

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), is wholly inapplicable in the following two situations:

   where tariff rates are the primary but not the exclusive means of precluding market entry by competitors, and

   where competitors of the defendant, rather than shippers, are the antitrust plaintiffs.

2. Whether an antitrust plaintiff may recover treble damages under § 4 of the Clayton Act, even though it is an indirect purchaser under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990), if it asserts antitrust standing under the balancing approach set forth in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, other respondents are Jones & Laughlin Steel Incorporated, Wheeling-Pittsburgh Steel Corporation, National Steel Corporation, Sharon Steel Corporation, Erie-Western Pennsylvania Port Authority and Codan Corporation, C.D. Ambrosia Trucking Company, Tauro Brothers Trucking Company, Toledo World Terminal, Inc. and Wills Trucking, Inc.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner is a wholly-owned subsidiary of Transtar, Inc., a non-publicly owned corporation. USX Corporation, a publicly owned corporation, has a minority stock ownership interest in Transtar, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Bessemer and Lake Erie Railroad Company ("B&LE") hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-88a) is reported at 998 F.2d 1144. The opinion of the district court denying petitioner's motion for a judgment notwithstanding the verdict (App. 91a-120a) is reported at 759 F. Supp. 219.

JURISDICTION

The court of appeals rendered its judgment on May 27, 1993. A petition for rehearing was denied (App. 121a-131a) on July 27, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

STATEMENT

This is an extraordinary antitrust case. The decision below violates two important legal doctrines—*Keogh* and *Illinois Brick*—that define the requirement of "injury" in § 4 of the Clayton Act, which applies to private treble damage actions under the federal antitrust laws. The decision also affirms a judgment that now exceeds $660 million—more than double the largest judgment previously affirmed in a federal antitrust case. This unprecedented award was affirmed only because the courts below refused to enforce both (1) the ban on the use of filed rates in antitrust damage actions established in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), and reaffirmed in *Square D Co.* v. *Niagara Frontier Tariff*

Bureau, 476 U.S. 409 (1986), and (2) the prohibition against recovery of treble damages by "indirect purchasers," established in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and reaffirmed in *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199 (1990). Had the court of appeals enforced these limitations, as the Sixth Circuit did in a case involving precisely the same defendants and the identical alleged conspiracy, *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), the damages in this case would have been zero. Because the court below has acted contrary to decisions of this Court and created striking conflicts among courts of appeals concerning the application of both *Keogh* and *Illinois Brick* in the process of affirming a grossly excessive judgment, review by this Court is warranted.

1. **Factual Background.** Petitioner is a small, 200-mile railroad line that operates between Conneaut, Ohio, and North Bessemer, Pennsylvania and that primarily serves USX Corporation (formerly the United States Steel Corporation). Respondents are five steel companies, two dock companies and three trucking companies that shipped or sought to receive or transport iron ore through lower Lake Erie ports. Throughout the relevant period, petitioner and several other railroads [1] transported iron ore for steel companies from railroad and steel company docks on Lake Erie to inland mills. App. 17a.

Much of the iron ore involved in making steel during the relevant period was mined in Michigan, Minnesota and eastern Canada. The ore historically was shipped in a mud-like form. It was loaded onto vessels called "bulkers" and shipped across the Great Lakes to various

[1] The original defendants in addition to petitioner were: the Chesapeake & Ohio Railway Company, The Baltimore & Ohio Railroad Company, CSX Corporation, the Pittsburgh & Lake Erie Railroad Company, Consolidated Rail Corporation, the Norfolk and Western Railway Company, Penn Central Transportation Co., and the Penn Central Corporation. The claims against all of the defendants, except petitioner, were settled or dismissed. App. 13a n.1.

railroad and steel company docks along lower Lake Michigan, Lake Erie and the Detroit River. App. 17a.[2] At these docks, specialized and relatively expensive equipment (essentially a crane equipped with a large bucket) was used to unload the ore from the bulkers. Much of the ore was then reloaded onto trains for delivery to inland steel mills. *Id.* at 17a-18a.

In the mid-1950's, some iron ore producers began processing ore into pellets. This "pelletized" ore could be transported in "self-unloading" vessels that could unload cargo directly onto a dock by means of a conveyer system built into the ships. The use of self-unloading vessels meant that the heavy equipment at railroad docks was no longer necessary to unload iron ore. Accordingly, so-called "private docks," which were owned by entities other than railroads or steel companies, sought to handle iron ore transported by self-unloaders, which the private docks could accommodate. *Id.* at 18a-19a.

Although self-unloading vessels had been used to transport minerals, such as limestone and coal, since the turn of the century, they did not become a significant factor in the transportation of iron ore on the Great Lakes until the early 1970's. Respondents' essential claim is that the railroads conspired to prevent or delay the use of self-unloading vessels for shipping iron ore. *Id.* at 19a.

According to the courts below, the railroads implemented this conspiracy primarily through rates set forth in tariffs filed by the railroads with the Interstate Commerce Commission (ICC). *First,* the railroads "ke[pt] dock handling *rates* for self-unloaders artificially high . . . [by] charg[ing] the steel companies the same dock handling rates for self-unloaders as for bulkers." *Id.* at

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[2] Contrary to the implication in the court of appeals' opinion, railroad docks were hardly dominant in this market. Steel companies owned 21 ore docks on the lower Great Lakes and two-thirds of all ore shipments during the relevant period of time were transported to *steel company docks,* not docks owned by railroads. J.A. 4767-68, 10102-03.

93a (emphasis added). *Second*, "the railroads refus[ed] to publish competitive commodity line haul *rates* [to transport iron ore] from . . . private docks to the steel mills." *Id.* (emphasis added). Instead, pursuant to the tariffs, the railroads would charge higher "class" rates to haul iron ore from "private docks." *Third*, "the railroads either refused to sell or lease to private concerns any property that could be used as an ore dock, or would only sell or lease the property subject to restrictions against such use." *Id.* at 94a. All of the rate-related conduct was subject to active regulation of the reasonableness of the rates by the ICC throughout the relevant period.

2. **Regulatory Background.** For iron ore delivered at the railroad docks, the railroads assessed "dock handling" charges to transfer the ore from the ship to rail cars. These charges were published as rates in tariffs filed with, and regulated by, the ICC.

Rail lines connected both railroad docks and steel company docks to the inland steel mills, and the railroads charged the steel companies "commodity line haul" rates to transport the ore over those lines to the mills. The rates for such transportation were published in tariffs filed with, and regulated by, the ICC. The filed tariffs did not provide "commodity line haul" rates for the carriage of ore from the "private docks" to steel mills. Instead, the filed tariffs provided "class rates" that applied to those shipments and that were much higher than commodity rates, but were equally subject to plenary ICC regulation.[3]

The ICC had regulated both dock handling rates and commodity line haul rates for decades prior to the events at issue in this case. In the *Iron Ore Rate Cases*, 41

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[3] The railroads collectively established these rates through an ICC-approved rate bureau. The Interstate Commerce Act ("ICA") expressly granted railroads antitrust immunity to engage in collective rate-making activities through rate bureaus. 49 U.S.C. § 5b (current version codified at 49 U.S.C. § 10706(a)(2)). *See ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 359-60 (1984).

I.C.C. 181 (1916); 44 I.C.C. 368 (1917), the ICC granted the *steel companies*' request to maintain uniform rates for handling iron ore on all railroad docks. This protected steel company shippers from disparate rate treatment. Similarly, the ICC also established uniform iron ore commodity line haul rates in order to equalize rail costs among different mills located roughly the same distance from Lake Erie.

Later, the ICC expressly held that railroads were not required to provide lower commodity line haul rates from "private docks" that wanted to compete directly with railroad docks for business. See, *e.g.*, *U.S. Phosphoric Prods. Corp.* v. *Atlantic Coast Line R.R.*, 206 I.C.C. 411 (1935). In 1956, this Court held that railroads were justified under the Interstate Commerce Act in establishing rates on a basis that favored railroad docks over privately owned, non-railroad docks, and in applying full dock handling charges to all shippers, even if shippers provided part of the unloading service themselves. *United States* v. *ICC*, 352 U.S. 158, 173-174 (1956).

In sum, ICC regulation for over 50 years was designed to preserve ore traffic and revenues for railroad docks to sustain their viability as common carriers and—at the steel companies' request—to prevent discrimination among steel company shippers. Although steel companies and any other affected parties could have requested the ICC to modify the rates for handling and carrying ore at any time during the 25 years in question, no such request was ever filed with the Commission. Instead, in the early 1980s, the railroads' filed rates became the core of the respondents' antitrust claims against petitioner and the other railroads.

3. **District Court Proceedings.** In complaints filed between 1980 and 1984, numerous parties brought antitrust actions against the railroads. Most of these actions were transferred to the United States District Court for the

Eastern District of Pennsylvania for pre-trial proceedings. App. 91a.[4]

According to the respondents, the railroads conspired "to halt the progress of self-unloader technology" in order to protect their investments in equipment on their docks. *Id.* at 93a (JNOV opinion). The case was tried largely on proof of two elements, *i.e.*, that the railroads conspired to maintain high class rates for "private docks" and to maintain high rates for dock handling to discourage the use of self-unloading vessels. The case was submitted to a jury instructed that it could impose liability for "various claims relating to the alleged agreement not to establish line haul rates from non-railroad docks." *Id* at 39a. Based on evidence of rate-related activities and instructions that such conduct could form the basis for a finding that petitioner violated the Sherman Act, the jury entered a verdict against petitioner.

With respect to damages, respondent steel companies requested damages for the lost savings that non-parties—vessel and dock companies such as the plaintiffs in the *Pinney Dock* case—allegedly would have passed on to them if self-unloading vessels had been used sooner.

The steel companies were awarded $414 million in "lost lake freight savings" on the following theory: But for concerted railroad rate activity, self-unloading vessels would have come into use sooner to transport iron ore to ports on the Great Lakes; those self-unloading vessels would have been more efficient than the bulkers actually used; and the independent vessel companies would have

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[4] Two related cases asserting identical conspiracy claims against the same railroads were not transferred. *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, and *Litton Indus.* v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). Those cases involved claims by Pinney, which was a private dock company on Lake Erie, and Litton, which operated a fleet of vessels on the Great Lakes that transported ore on the Great Lakes. As discussed *infra*, the Sixth Circuit in that case dismissed under the *Keogh* doctrine all portions of the case involving rates filed with the ICC. 838 F.2d at 1455-60.

passed through their cost savings to the steel companies by charging them less than the steel companies actually paid them for lake transportation. App. 98a. With respect to dock handling charges, the steel companies were awarded $110 million on the hypothesis that the introduction of self-unloading vessels would have fostered the development of private docks, that the steel companies would have shifted more of their business to the private docks sooner, and that the private docks would have set lower rates for steel companies' dock handling than were charged either by railroads under their tariffs or by any private dock. See *id.* at 99a.

The claims of the private docks and trucking companies also arose out of this hypothetical alternative system of transporting iron ore. These plaintiffs asserted that the use of self-unloading vessels would have increased the amount of ore unloaded at private docks. In turn, the increase in the number and use of private docks would have created additional opportunities for trucking companies to transport ore from those docks to the steel companies.

The district court denied petitioner's JNOV motion. *Id.* at 91a-120a. The court held that *Keogh* did not apply because "each railroad must remain free to propose its own tariffs," and agreements "which purport to curtail such freedom of independent action to propose tariff rates —can give rise to antitrust liability." *Id.* at 96a. The court also held that the jury could find that the railroads' conduct was not "immune" from antitrust scrutiny. *Id.*

"With less than complete confidence," the district court likewise refused to disturb the jury's award of lost "lake freight savings." *Id.* at 101a. In rejecting petitioner's challenge under *Illinois Brick*, the court expressed considerable reservations as to whether the steel companies could recover such damages because their claims were based on savings that vessel operators—not the railroads —would have passed on to them. *Id.* at 99a-100a. To avoid this manifest violation of the indirect-purchaser rule, the district court theorized that the steel companies in a

hypothetical world would have entered the lake-transport market as self-unloading vessel operators and thus would have been directly injured by the railroads' alleged effort to exclude all self-unloaders from that market. *Id.* at 101a.

4. **The Decision of the Court of Appeals.** The court of appeals affirmed. App. 1a-88a. The court held that the rate-related aspects of the case that dominated the steel companies' proof did not violate *Keogh* because the railroads' conduct was designed to exclude potential competitors from the market and was not limited exclusively to rate-related activity. The court of appeals concluded that this case presented an issue "left unresolved" in *Square D, viz.*, whether *Keogh* prevents a private litigant from recovering antitrust damages from railroads that "conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry." *Id.* at 29a.[5]

As for the dock and trucking companies, the court held that *Keogh* does not apply to their antitrust claims because they are competitors (as opposed to customers) of the railroads. In doing so, the court acknowledged expressly that its decision was in conflict with the Sixth Circuit in the *Pinney Dock* case, which held that "*Keogh* . . . bar[s] competitors' claims." App. 36a.

With respect to *Illinois Brick*, the Third Circuit expressly rejected the district court's theory that the steel companies would have become vessel operators and thus would have been injured directly by the railroads' conduct. App. 44a. The court found this theory to be unsupported by the evidence and by the jury's verdict, *id.* at 44 n.15, finding instead that the steel companies' claims for lost savings from vessel companies were those of an "indirect purchaser." *Id.* at 50a. Nevertheless,

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[5] Because the court below rejected petitioner's argument that under *Keogh* only non-rate activity could lawfully serve as a basis for an antitrust claim, the court did not reach the additional defense that evidence of non-rate activity on the part of petitioner was wholly insufficient to support a finding of an antitrust violation. *See* note 9 *infra*.

the court of appeals held that *Illinois Brick* was no bar to recovery because the "indirect purchaser" rule was subsumed by the broader and more amorphous standards announced by this Court in *Associated General Contractors, Inc.* v. *California State Council of Carpenters,* 459 U.S. 519 (1983) (*"AGC"*). The panel bluntly explained that: "It is the *AGC* analysis—the most recent, comprehensive and relevant statement of the Court—which will resolve the standing question here." App. 42a. Thus, even though the steel companies were found to have recovered as indirect purchasers, and even though direct purchasers could and did seek to recover duplicative damages for precisely the same conduct, recovery was allowed because the court of appeals concluded that the *AGC* factors more generally indicated that respondents did have standing to sue under § 4 of the Clayton Act. App. 50a. ("Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claims, this conclusion is not supported by current law").[6]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals has done grievous harm to both the *Keogh* and *Illinois Brick* doctrines and plainly conflicts with decisions of other courts of appeals that have faithfully applied this Court's precedents to those issues. With respect to *Keogh* and *Square D,* the panel's holding that filed rates can be included as the dominant component of an antitrust damage claim where there is proof of some non-rate-related conduct and where the defendant acts to preclude a competitor from entering a particular market unquestionably conflicts with the Sixth Circuit's holding in *Pinney Dock* on identical facts and represents an enormous and unjustified exception to *Keogh*'s clear prohibition against the use of filed rates to recover antitrust damages. Moreover, the acknowledged conflict between the circuits as to whether

[6] The court of appeals denied rehearing. But three judges—Judges Becker, Alito and Stapleton—noted their dissents from the denial of rehearing in banc. App. 130a-131a.

Keogh and this Court's subsequent decision in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), bar competitors' rate-based claims could not be presented more squarely than by the holding below.

The important and recurring issue concerning *Illinois Brick* as reaffirmed in *Utilicorp* is independently worthy of review. The Third Circuit's decision here to strip the indirect purchaser restriction of all independent significance in light of *AGC* undermines that important doctrine and cannot be reconciled with the rigorous enforcement by this Court in *Utilicorp* and other courts of appeals of the bright-line rule prohibiting indirect purchasers from recovering treble damages.

In sum, the panel's holding raises two issues of recurring significance and the panel's erroneous application of *Keogh-Square D* and *Illinois Brick-Utilicorp* has resulted in the largest affirmed federal antitrust award in history. Accordingly, review by this Court of the judgment below is doubly warranted.

I.

The decision below both creates a conflict and exacerbates an existing division among the courts of appeals over issues critical to the scope and application of the *Keogh* doctrine. *First*, it creates a division among the courts over whether the doctrine applies to conspiracies involving mixed rate and non-rate activities to exclude competitors from a market. *Second*, it deepens the division over whether *Keogh* bars treble damage actions brought by competitors. These issues are significant not only to the nation's railroad industry, which continues to move substantial volumes of traffic under ICC-regulated tariffs, but to a host of industries—including motor carriers, ocean shipping companies, gas pipelines, telecommunications companies and electric and gas utilities—that are subject to federal and state tariff requirements.

A. **Customer Claims.** The court of appeals below acknowledged, as it had to, that "ICC-approved rates

played a role" in the alleged conspiracy to "thwart[] market entry" by lower cost self-unloaders and by private dock and trucking company competitors. App. 29a. Like the district court, the court of appeals found that the defendants effectuated their alleged conspiracy—and thus injured the steel company plaintiffs—through the following three "nefarious means":

> [1] *charging the same rate* for unloading a self-unloader as for unloading a bulker, . . . [2] *refusing to approve commodity line haul rates* from private docks which would have handled self-unloaders [and thus leaving higher class rates to such docks in effect], and . . . [3] concertedly refusing to make dock property available for use by private docks. *Id.* at 51a (emphasis added).

The first two of these "means" indisputably involved the rates filed in tariffs with the ICC.[7]

Citing this Court's decisions in *Keogh, Georgia,* and *Square D,* B&LE argued that tariffed rates, either alone or in tandem with other activity, cannot serve as the basis of antitrust damages. In rejecting this argument, the court of appeals held that *Keogh* does not apply to the steel companies' claims because the purpose of the conspiracy was to "preclude competition" by "thwarting market entry" (App. 29a) and because the means employed were not exclusively rate-related. *Id.* Far from involving an "unresolved" issue, this holding is directly contrary to this Court's opinion in *Square D* and conflicts with the Sixth Circuit's contrary decision, on virtually identical facts, in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988), as well as with the Fourth Circuit's decision in *Lifschultz Fast Freight, Inc.* v. *Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir. July 6, 1993).

1. *This Court's Decisions.* Construing the term "[i]njured" in what is now § 4 of the Clayton Act, this

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[7] *See also id.* at 93a-94a (district court) (quoted *supra* pp. 3-4).

Court held in *Keogh* that "[i]njury implies violation of a legal right." 260 U.S. at 163. The Court then held that "legal rights" in this setting are defined exclusively by filed tariffs. Accordingly, "[u]nless and until suspended or set aside [by the ICC], this rate [in a published tariff] is made, *for all purposes*, the legal rate." *Id.* at 162-63 (emphasis added). Therefore, the Court held that the treble damage action in *Keogh* was barred because rates were "the instrument by which the damage [was] alleged to have been inflicted." *Id.* at 165.[8] See also *Georgia*, 324 U.S. at 443-44, 453.

In *Square D*, the Court reaffirmed that " '[a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade,' ", and that a shipper therefore "could not have been 'injured in his business or property' " by tariffed rates. 476 U.S. at 416 & n.18 (quoting *Keogh*, 260 U.S. at 162). The Court accepted as true the allegation that the defendant carriers conspired "to inhibit or eliminate competition" through coercion. *Id.* at 412. It nevertheless held that, under *Keogh*, "an award of treble damages is not an available remedy for a private shipper" claiming that a filed rate "was the product of an antitrust violation." *Id.* at 422. In so holding the Court reaffirmed *Keogh* as "an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes," and applied it to restrict private damage actions to the non-rate aspects of a conspiracy enforced through coercion. 476 U.S. at 414, 423.

These cases unambiguously establish that tariffed rates cannot give rise to, or form the basis of liability for, antitrust damages. Nevertheless, the Third Circuit refused to apply these precedents because the purpose of the con-

[8] The panel tried to distinguish this case from *Keogh* on the theory that here "the instrument of damage" was not rates but "the absence of the lower-cost combination." App. 32a. The distinction, however, is purely semantic. By the panel's own concession, two of the three "means," and therefore "instruments," that caused the absence of the "lower-cost combination" were rates. *Id.* Thus, *Keogh* cannot be distinguished on this basis.

spiracy was to "preclude competition by thwarting market entry" (App. 29a), the means employed were not exclusively rate-related (*id.* at 32a), and ICC-regulated entities are not immune from the antitrust laws (*id.* at 35a). This Court has already rejected these arguments.

First, contrary to the premise below, *Square D* did not leave "unresolved" the question whether *Keogh* "preclude[s] treble-damage recovery for private litigants claiming that members of a regulated industry conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry." App. 29a. Rather, this Court accepted as true the allegation that the defendant carriers conspired "to inhibit or eliminate competition." *Square D*, 476 U.S. at 412. It nevertheless held that *Keogh* applied insofar as the plaintiffs sought to recover damages based on tariff rates.

Moreover, the issue of whether *Keogh* applies to claims of market exclusion already had been resolved by the Court in *Georgia*. There the State alleged a conspiracy among northern railroads to exclude competition by southern railroads and ports by refusing to enter into joint rate agreements with the southern railroads. The alleged conspiracy had the purpose of thwarting market entry by southern railroads and ports, but this Court held that the "reasoning and precedent of [*Keogh*] apply with full force." *Georgia*, 324 U.S. at 450 & 453.

Second, *Square D* held that, even where non-rate conduct is alleged, if rates played a role, any damages inflicted by such tariff rates cannot, under *Keogh*, constitute injury under § 4. The panel's holding to the contray is flatly wrong. As *Square D* demonstrates, where an alleged conspiracy involves both rate- and non-rate conduct, the proper course is to excise all claims of injury inflicted by tariff rates and confine the trial to the alleged non-rate activity. 476 U.S. at 414 (remanding for opportunity "to state possible claims for damages *not arising*

from the filed tariffs" (emphasis added)). See also *Pinney Dock*, 838 F.2d at 1457 (same).[9] It is uncontroverted that rates not only "played a role" but were at the core of respondents' claims here. See pp. 3-4, 9 *supra* & note 7 *supra*.

Third, the court of appeals' guiding belief that "*Keogh* does not give ICC-regulated industries carte blanche to preclude competition" misses the point. No one suggested that *Keogh* and *Square D* grant immunity from the antitrust laws.[10] As the Court explained in *Square D* (476 U.S. at 422):

> The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy. . . .

2. *Circuit Conflicts.* Not only is the holding below flatly contrary to this Court's decisions, it also conflicts with holdings of at least two other circuits. As the panel below acknowledged, "[t]he *Pinney Dock* case involve[d]

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[9] Petitioner has never contended that respondents are prevented from attempting to prove that non-rate-related activities by the railroads injured them. The reason respondents have steadfastly refused to undertake this effort is that there is no evidence that petitioner was part of any conspiracy that was not rate-related. There is no evidence implicating petitioner in any conspiracy to refuse to sell or lease space for private docks. In any event, without a lower rate for transporting the ore to a mill, docks were not economically viable (as acknowledged by respondents in their briefs below). *See* Appellees' Joint Br. at 6 and Erie Br. at 3-4.

[10] Indeed, the original defendants in this action (including B&LE) were defendants in a federal criminal antitrust case. *See United States* v. *Baltimore & Ohio R.R.*, 538 F. Supp. 200 (D.D.C. 1982). The one railroad that went to trial in that action (Norfolk and Western) was acquitted; B&LE's conviction pursuant to its plea of *nolo contendere* was affirmed by the court of appeals. *See United States* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593 (D.C. Cir. 1983).

the same defendants and the same conspiracy at issue here." App. 33a. Applying *Keogh* to precisely the same "nefarious means" of market preclusion, the Sixth Circuit held "that the *Keogh* doctrine bars the plaintiffs' antitrust damage claims insofar as these claims are based either on the defendants' own handling charges or on the line-haul rate that was applied from [private docks]." 838 F.2d at 1457. In allowing plaintiffs to pursue non-rate-related claims on remand, the Sixth Circuit expressly prohibited reliance on the very evidence and claims that formed the basis for the jury's verdicts here. As the Sixth Circuit explained (*id.* at 1457-58):

> Plaintiffs contend that defendants refused to handle self-unloading vessels at docks owned or operated by defendants and that defendants boycotted Pinney Dock. However, if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of *Keogh*. Plaintiffs also allege that defendants divided markets, but if the effect of such division is the lack of rate competition, *Keogh* would again bar recovery.

The conflict between the decisions of the Third and Sixth Circuits could not be starker. Passing on the same conspiracy, undertaken by the same defendants for the same allegedly exclusionary purposes, the Third Circuit found that *Keogh* posed no bar to affirmance of a $660 million treble damages award that was based on precisely the same rate-related conduct that the Sixth Circuit held lawful under *Keogh*.[11] These wholly disparate results —and the inconsistent interpretations of *Keogh* that produced them—warrant review by this Court.

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[11] The suggestion by the panel that the "different procedural position" of the *Pinney Dock* case somehow distinguishes the two rulings (*see* App. 33a) is entirely mistaken. Reviewing a summary judgment decision, the Sixth Circuit was obliged, like the panel below, to view the evidence most favorably to the antitrust plaintiffs. The panel's purported distinction, therefore, is entirely without significance.

The court's rationale in this case is also inconsistent with the Fourth Circuit's summary affirmance in *Lifschultz Fast Freight*. In that case, the plaintiff alleged that a group of trucking concerns conspired "to provide false information to the rate bureaus and the ICC which would allow the defendants to charge below cost . . . . [as] part of a scheme of predatory pricing . . . designed to force the defendants' competitors out of the . . . market." *Lifschultz*, 805 F. Supp. 1277, 1282 (D.S.C. 1992). In a decision the Fourth Circuit found to be "thorough and well reasoned," the district court held that "Lifschultz's Sherman Act, RICO, and [state antitrust] claims were barred by the *Keogh* doctrine" even though non-rate activity was alleged and even though market exclusion was the anticompetitive aim of the conspiracy. *Lifschultz Fast Freight*, 1993 U.S. App. Lexis 16974, at *2 (footnote omitted).

Thus, the Third Circuit's flawed reasoning not only departs from this Court's rulings, but also has created a division among the circuits on a critical question of antitrust and regulatory law. As this case and the Sixth Circuit's decision in *Pinney Dock* graphically illustrate, a tariff-regulated entity's potential liability for hundreds of millions of dollars in antitrust damages currently depends on the circuit in which an antitrust plaintiff chooses to bring suit. This Court should grant certiorari to ensure a uniform and proper construction of the *Keogh* doctrine among the circuit courts.

B. **Competitor Claims.** The decision below also is inconsistent with this Court's decision in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945). There, this Court applied *Keogh* to claims the State brought in its *parens patriae* capacity on behalf of its shippers and ports and in its capacity as a shipper and the owner of a railroad. The court below deemed *Georgia* inapplicable because this Court treated Georgia's claim as a proprietor as a "make weight." App. 37a n.6. But this Court in *Georgia* ruled that *Keogh* also applied to the State's *parens patriae* claim on behalf of its ports, which, like the dock

plaintiffs here, claimed that filed rates caused them injury by impeding their ability to compete for traffic. See also *Pinney Dock*, 838 F.2d at 1457 n.12 (applying *Keogh* to virtually identical claims by private docks because this Court had "appl[ied] *Keogh* in a case where Georgia was both a customer and a competitor").

Despite the clear holding of *Georgia*, the lower courts remain badly divided over whether *Keogh* applies to competitor claims. Relying on an earlier Third Circuit decision, as well as decisions by the Second, Eighth and Ninth Circuits, the panel below held that *Keogh* does not apply to treble damage claims brought by competitors. App. 36a (citing *Barnes* v. *Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985); *Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); and *Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981)). As the court here acknowledged, its holding conflicts directly with that of the Sixth Circuit in *Pinney Dock*, which ruled that *Keogh* barred such claims.

Noting the remedial aspects of the ICA and the fact that competitor-plaintiffs have "a right under the IC[A] to complain to the Commission" (838 F.2d at 1457), the Sixth Circuit held in *Pinney Dock* that there was no sound basis for limiting *Keogh* to treble damage claims brought by consumers. As the Sixth Circuit explained (*id.*):

> [T]he ICC possesses and ought to have the power to override . . . [the policies underlying the antitrust laws] in order to further national transportation policy . . . Rates must not only protect against over charging captive customers but must also keep in mind the economic costs of delivery of the service. Regulation of one aspect inevitably begets regulation of the other. Thus, the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors.

It follows that an exception to *Keogh* for competitor claims is not only unnecessary, in view of the broad remedial jurisdiction of the ICC, but would subvert rate

regulation under the ICA. Moreover, it is completely anomalous to hold the rate legal for some purposes and some plaintiffs, but illegal for others. These same considerations led the Fourth Circuit to apply *Keogh* to competitor claims. Thus, in *Lifschultz*, 805 F. Supp. at 1277, the district court expressly adopted the Sixth Circuit's reasoning (*id.* at 1295), a disposition the Fourth Circuit affirmed on appeal. The acknowledged conflict in the circuits, coupled with the release of two inconsistent court of appeals rulings within weeks of each other, demonstrate plainly that the applicability of *Keogh* to antitrust damage claims warrants review by this Court.

C. **Widespread Importance of Keogh.** The applicability of the *Keogh* doctrine to alleged conspiracies designed to exclude a market participant and to claims brought by competitors has significance far beyond the affirmance of a record $660 million judgment. These issues are profoundly important to the entire railroad industry, as well as to a host of other industries subject to federal and state tariff requirements.

Notwithstanding the partial deregulation of the railroad industry under the Staggers Act of 1980, substantial volumes of rail traffic continue to be shipped under ICC tariffs. In addition, motor carriers also remain subject to ICC-tariff regulation. Although the Motor Carrier Act of 1980 partially deregulated the trucking industry, motor common carriers "must fil[e] tariffs [with the ICC] specifying the rates adopted by the carrier." *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).

Nor is the scope of the *Keogh* doctrine relevant only to industries subject to ICC regulation. A number of federal statutes require other regulated entities to publish their rates in tariffs subject to agency oversight, see, *e.g.*, 15 U.S.C. § 717c(c) (interstate sellers and transporters of natural gas); 16 U.S.C. § 824d(c) (interstate sellers and transmitters of electricity); 47 U.S.C. § 203 (providers of interstate telephone service); 46 U.S.C. § 844 (inter-

coastal ocean shipping companies).[12] Indeed, there is a separate but related doctrinal conflict among the circuits concerning the application of *Keogh* to competitors' claims arising out of rates for electricity.[13] As a result of the division of authority created and exacerbated by the decision below, the scope of antitrust liability of some of the nation's largest utilities and industrial concerns will turn on the fortuity of the federal circuit in which they are sued.

II.

The decision of the Third Circuit conflicts with the bright-line rule, first announced in *Illinois Brick* and consistently followed by this Court (most recently in *Utilicorp*) and by all other courts of appeals, that antitrust plaintiffs who are "indirect purchasers" do not suffer "injury" within the meaning of § 4 of the Clayton Act. In disregarding the bar to recovery by "indirect purchasers," the court below also compounded the widespread confusion among the courts of appeals over the relationship between antitrust injury and antitrust standing. That confusion has now ripened into a clear circuit conflict with the Third Circuit's unprecedented decision here, which holds that regardless of whether a plaintiff can independ-

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[12] Moreover, because the critical language of the treble damage provision that this Court construed in *Keogh* is identical to the private right of action set forth in the Racketeer Influenced Corrupt Organizations Act (RICO) (*compare* 18 U.S.C. § 1964(c) *with* 15 U.S.C. § 15(a)), the decision below could significantly broaden the liability of tariff-regulated entities under RICO as well. *See H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992) (holding that *Keogh* doctrine, and decisions construing its applicability and scope, are fully applicable to RICO actions); *Taffet* v. *Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992) (same).

[13] *See Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991); *Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981).

ently establish "injury" under § 4 of the Clayton Act, it still may seek treble damages so long as it asserts antitrust "standing" under the balancing approach set forth in *AGC*.

A. Indirect Purchaser Claims. If the Third Circuit had properly applied the "indirect purchaser" rule, it would have reversed the vast majority of the damages awarded against petitioner here. Those damages clearly are barred by the bright-line rule, first announced in *Illinois Brick* and consistently followed by this Court and all other courts of appeals, that "indirect purchasers"—those relying for damages upon a theory that directly injured third parties would have passed on savings to plaintiffs—do not suffer "injury" within the meaning of § 4. *Illinois Brick*, 431 U.S. at 736-47.

1. In *Illinois Brick*, the State of Illinois claimed that concrete block suppliers overcharged contractors by fixing prices, and that the contractors in turn passed on the overcharge to the State. The Court had previously prohibited defendants from defending against antitrust claims on grounds that any injury suffered by an overcharged plaintiff had been "pass[ed]-on" to plaintiff's customers. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968). In *Illinois Brick*, the Court held that the ban on "pass-on" theories also applied to plaintiffs. The Court offered two reasons for its holding. *Illinois Brick*, 431 U.S. at 730. First, allowing offensive, but not defensive, use of pass-on theories would "create a serious risk of multiple liability for defendants." *Id.* Second, calculating damages under a plaintiff's pass-on theory typically would involve even greater "evidentiary complexities and uncertainties" than the Court identified in *Hanover Shoe* as grounds for rejecting defendants' use of pass-on. *Id.* at 731-32. In addition, the Court made clear that its decision was not limited to the facts of that case: the Court rejected "attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets." *Id.* at 744.

The question resolved in *Illinois Brick*—whether an indirect purchaser may be deemed to have "been injured in its business as required by § 4" (*id.* at 724)—is a threshold question to be resolved in every antitrust damage case. Thus, the Court noted that its decision did not reach the distinct issue of standing: "Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *Id.* at 728 n.7. See also *Blue Shield v. McCready*, 457 U.S. 465, 473 & 476 (1982) (same).

The vitality and far-reaching applicability of *Illinois Brick* as a distinct limitation on the availability of the § 4 remedy was powerfully reinforced by the Court's decision in *Utilicorp*. This Court reaffirmed "[t]he *Illinois Brick* rule," 497 U.S. at 212, and strengthened the prohibition against exceptions to it, *id.* at 216-17. In *Utilicorp*, the Court applied that rule to a case where the middlemen were public utilities. The nature of public utility ratemaking made it plausible to assume that the utilities would pass on 100% of any overcharges to their customers. Nevertheless, the Court emphatically reaffirmed the *Illinois Brick* rule, "hold[ing] that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4." *Id.* at 204, 212. The Court recognized that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216; see also *id.* at 217. Nowhere in *Utilicorp* did the Court suggest that the "analytically distinct" *Illinois Brick* rule had been subsumed in the standing inquiry expounded in *AGC* seven years before *Utilicorp* was decided. Indeed, petitioners in *Utilicorp* unsuccessfully presented that very same argument to the court of appeals, and this Court's *Utilicorp* opinion did not even refer to *AGC*.

This Court affirmed the decision of the Tenth Circuit which expressly rejected the argument, based on

AGC, "that *Illinois Brick* should not be read as a rigid bar to recovery on the part of all indirect purchasers." *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286, 1294 (10th Cir. 1989), *aff'd sub nom., Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990). See also *Adams* v. *Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 n.9 (D.C. Cir. 1987) (distinguishing *AGC* from *Illinois Brick*, "which flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases"). In light of *Utilicorp*, the court of appeals' conclusion that "current law" does not support the argument that respondents' status as "indirect purchasers" is the "death knell" of their claims (App. 50a) is both provocative and worthy of review by this Court.

The court of appeals "discount[ed]" the Court's decision in *Utilicorp* as "current law" because that decision applied "the pass-on theory of standing in the public utility arena." App. 50a n.21. To the contrary, *Utilicorp* applies fully to cases, such as this one, where the amount of the pass-through is speculative. Far from being limited in any way, *Utilicorp* expressly reaffirms the Court's determination in *Illinois Brick* "not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' " *Utilicorp*, 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744) (brackets in original). "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case," the Court wrote, "we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp*, 497 U.S. at 217.

2. The bright-line rule of *Illinois Brick* and *Utilicorp* plainly bars most—$524 million—of the steel companies' award in this case. The steel companies recovered damages for lost savings that directly-injured third parties—vessel and dock companies—allegedly would have passed on to them had the use of self-unloaders and private docks in the iron ore trade not been delayed. With respect to these damages, therefore, the steel companies are "indirect purchasers," and their injuries in that capacity are

not compensable under § 4. App. 50a & n.21; *Illinois Brick*, 431 U.S. at 736-47.

Both of the reasons that led the Court to prohibit pass-on damage theories apply with full force here. First, duplicative recoveries are inevitable. The steel companies' recovery for lost savings overlaps the damages that the vessel and dock companies can and have claimed for being denied the opportunity to provide self-unloader and dock services. The same hypothetical pool of reduced costs is the source of increased vessel company profits or, if passed on to the steel companies, savings in steel company transportation costs.[14] In fact, the very same lake freight savings (and much of the dock savings) recovered by the respondent steel companies were also claimed by a vessel operator and a dock operator in a separate lawsuit

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[14] The court of appeals speculated in a footnote that "the steel companies' damages would not *necessarily* duplicate the damages of the vessel and docking companies," App. 89a-90a (emphasis added). Offering the hypothetical that the steel companies might have paid $7/ton for the lake carriage and dock handling of iron ore using self-unloaders and private docks, instead of $10/ton using bulkers and railroad docks, it stated that steel companies could then collect $3/ton in lost savings while the vessel and docking companies could collect their lost profits out of the $7. *Id.* at n.22.

The hypothetical demonstrates just how badly that court misread *Illinois Brick*. Not only does the panel's analysis erroneously assume that the possibility of duplicative recovery is permissible, *see* 431 U.S. at 731, but it is conceptually flawed because it ignores that the vessel companies, dock companies and steel companies have conflicting interests in maximizing their respective share of the pool of lost savings. The steel companies' incentive is to argue that dock and vessel companies would reduce their prices as low as possible—to $7 total (in the hypothetical)—in order to increase the amount of their lost savings, while the dock and vessel companies have every incentive to argue they would not cut their prices nearly so much—say only to $9 combined—in order to maximize the damages they can recover as lost profits. *See Pinney Dock*, 838 F.2d at 1464 (noting duplicative claims even between dock and vessel companies). Because these conflicting claims create an intolerable risk of duplicative recoveries and are inherently speculative, the analysis below proves why the indirect purchaser rule bars recovery here.

settled by petitioner.[15] Thus, the court's reasoning below "cannot protect against multiple liability where the direct purchasers have already recovered . . . by settling." *Illinois Brick*, 431 U.S. at 731 n11.[16]

Second, respondents' damage theory is extraordinarily complex and speculative. The court of appeals specifically recognized that "complex apportionment problems are implicated here." App. 53a. The steel companies' pass-on theory required the jury to speculate as to the savings that independent firms in two industries (vessel transportation and dock services) would have passed on to independent firms in a third industry (steel) if a fourth industry (rail transportation) had not delayed the use of self-unloaders for shipping iron ore. It involved precisely the kind of speculation about "complex economic adjustments to a change in the cost of a particular factor of production" that the Court rejected in *Illinois Brick*. 431 U.S. at 732. It also presented the "nearly insuperable difficulty" of trying to prove "what the direct purchaser might have done," which the Court condemned in *Utilicorp*, 497 U.S. at 209 (quoting *Hanover Shoe*, 392 U.S. at 493).

B. Injury Versus Standing. The court of appeals acknowledged that the steel companies' claims were those

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[15] One vessel company, Litton, and one dock company, Pinney Dock, previously sued B&LE and the other railroad defendants for treble damages. The damages Litton was permitted to seek included the profits it lost in not being able to introduce self-unloaders sooner. *Pinney Dock*, 838 F.2d at 1452. Similarly, Pinney Dock was permitted to assert claims that it would have attracted business because its charges for dock services would have been less than those at the railroad docks. *Id.* at 1451-53, 1482-83.

[16] Under *Hanover Shoe*, petitioner is precluded from arguing that any damages suffered by the parties directly injured by the delay in the introduction of self-unloaders, namely the vessel and dock companies, should be reduced by the amount of "savings" that those companies would have passed on to their customers, the steel companies. In turn, under *Illinois Brick* and *Utilicorp*, the steel companies must be precluded from recovering those same "pass-on" savings. 431 U.S. at 730-31.

of an "indirect purchaser"; that the vessel companies were entities that had suffered "direct antitrust injury" (App. 52a); that the vessel companies' claims for lost profits would "overlap" the steel companies' claims of lost savings (*id.* at 53a); and that "[t]he concern for duplicative recovery and the potential for complex apportionment of damages are real," (*id.* at 52a). But the court nonetheless affirmed the award of treble damages, refusing to treat "the 'indirect purchaser' rule of *Illinois Brick* as announcing a strict prohibition against recovery by indirect purchasers." *Id.* at 50a n.21. Instead, the court of appeals concluded that whether a plaintiff can establish antitrust injury under *Illinois Brick* is merely one factor that can be outweighed in the context of "a more complex and differently focused [standing] inquiry" under *AGC*. App. 44a.

The court of appeals misread *AGC* and other related decisions of the Court, and in so doing created a clear conflict among the circuits. *AGC* did not involve a claim for damages by an indirect purchaser. *AGC* is a case about antitrust *standing*, which, as the Court carefully noted in *Illinois Brick* and *McCready*, is an issue "analytically distinct" from whether an indirect purchaser should be considered to have suffered an *injury* under § 4. *Illinois Brick*, 431 U.S. at 728 n.7; *McCready*, 457 U.S. at 473, 476. In setting forth factors to guide the standing inquiry, the Court in *AGC* provided no license for rehabilitating the antitrust damage claims of indirect purchasers. To the contrary, the Court in *AGC extended* the logic of *Illinois Brick* to bar claimants who did not bring indirect purchaser claims, but whose relationship to the alleged violation was nonetheless remote.

The Third Circuit's decision thus permits recovery of treble damages by plaintiffs who have not suffered injury within the meaning of § 4. Contrary to the reasoning of the panel, this Court's decision in *AGC* did not alter or eliminate the mandatory requirement that a plaintiff suffer antitrust injury before being permitted to pursue

an antitrust claim. The panel's transformation of the dispositive "injury" element into merely one among a number of factors to balance in determining standing conflicts with this Court's recognition in *Cargill, Inc.* v. *Monfort*, 479 U.S. 104, 110 n.5 (1986), that a " 'showing of antitrust injury *is necessary*, but not always sufficient, to establish standing under § 4 . . . ." (emphasis added). Because "antitrust injury" is indispensable to a § 4 claim, it follows *a fortiori* that an indirect purchaser's lack of any "injury" at all within the meaning of *Illinois Brick* is fatal to a § 4 claim, even if that plaintiff might otherwise establish standing under the *AGC* factors.

Not only does the holding below implicate a significant issue under *Illinois Brick*, but also it exacerbates a related doctrinal problem concerning the relationship between antitrust injury and antitrust standing. The courts of appeals themselves have found that there is a "great deal of confusion" among the circuits on that issue. *Greater Rockford Energy & Technology* v. *Shell Oil Co.*, 998 F.2d 391, 394-95 (7th Cir. 1993). With the Third Circuit's decision here, that confusion has ripened into a clear conflict among the circuits. A number of circuits, including the Seventh and the Tenth, hold that antitrust injury and antitrust standing are entirely separate and independently necessary elements of an antitrust claim.[17]

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[17] *See, e.g., Greater Rockford Energy & Technology* v. *Shell Oil Co.*, 998 F.2d 391, 394-95 (7th Cir. 1993) (affirming grant of summary judgment for defendants on ground that plaintiffs failed to show antitrust injury; court declined to address issue of antitrust standing and discussed distinction between antitrust injury and antitrust standing at length) ("Lack of standing and antitrust injury often have been invoked interchangeably against a plaintiff even though each concept involves a distinct element of the § 4 action"); *Sharp* v. *United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir.) ("[w]hile the two concepts [antitrust injury and antitrust standing] are closely linked, they are nonetheless distinct"), *cert. denied*, 113 S. Ct. 464 (1992); *Chanute* v. *Williams Natural Gas Co.*, 955 F.2d 641, 652 n.14 (10th Cir.) ("[a]n antitrust injury is different from antitrust standing"), *cert. denied*, 113 S. Ct. 96 (1992); *Reazin* v. *Blue Cross & Blue Shield*, 899 F.2d 951, 960

Other circuits, including the Fifth, Sixth, Eighth, and Eleventh, hold that under this Court's decision in *AGC*, antitrust injury is intertwined with the requirement of antitrust standing.[18] Nevertheless, those courts have made clear that, even if antitrust injury is part of the standing inquiry, it remains an essential part: without antitrust injury, those courts have held, there is no antitrust standing.[19] The primacy of the injury requirement is thus recognized in those circuits as well, and therefore, those courts would have disallowed all of the lake freight and dock savings awarded in this case.

The Third Circuit stands alone in upholding an award of treble damages to plaintiffs on the ground that they have standing under *AGC*, without regard to whether they have suffered antitrust injury under § 4. No other court has ever applied *AGC* to circumvent the ap-

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(10th Cir. 1990) ("antitrust injury" is an "essential element[] in a private antitrust damages action"), *cert. denied*, 497 U.S. 1005 (1990).

[18] *See, e.g., Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988) ("[a]ntitrust injury is a component of the standing inquiry, not a separate qualification"); *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1449 & 1451 n.20 (11th Cir. 1991) (describing two-pronged approach to antitrust standing, with first prong being "whether the plaintiff has suffered 'antitrust injury'"); *Axis, S.p.A.* v. *Micafil, Inc.*, 870 F.2d 1105, 1108-09 (6th Cir.) ("[a]ntitrust injury is a concept distinct from antitrust standing, but is an element in the determination of standing"), *cert. denied*, 493 U.S. 823 (1989); *Lovett* v. *General Motors Corp.*, 975 F.2d 518, 520 (8th Cir. 1992) (describing antitrust injury as part of standing inquiry).

[19] *See, e.g., Lovett*, 975 F.2d at 521 ("[b]ecause [plaintiff] has not shown he suffered an antitrust injury, he lacks federal antitrust standing"); *Todorov*, 921 F.2d at 1451 n.20 ("*Cargill* has clarified that antitrust injury is a necessary component of antitrust standing. Thus, the discussion of factors beyond antitrust injury in [*AGC*] is best viewed as dicta"); *Axis*, 870 F.2d at 1109 (affirming dismissal on basis of failure to show antitrust injury and expressly declining to consider other *AGC* factors); *Bell*, 847 F.2d at 1182 ("antitrust injury is a necessary requirement for proving standing").

plication of the requirement of antitrust injury under *Illinois Brick* in such a manner. To the contrary, in cases involving comparable pass-on damages claims, courts have repeatedly recognized that the plaintiff's status as an indirect purchaser requires dismissal regardless of whether the plaintiff could assert standing under *AGC*.

For example, *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 543-44 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991), was a market exclusion case in which the Fourth Circuit held that a railroad customer was barred by *Illinois Brick* from recovering for an "indirect" injury resulting from the railroad's refusal to lease trackage rights to its lower-cost competitor with whom the customer sought to deal. The court stated that the customer's "harm from the refusal of trackage rights [was] discernible but indirect" because, like the steel companies here, it "only lost potential savings on transportation costs through [the] direct purchaser [*i.e.*, the competitor]." *Id.* at 544. The *Laurel Sand* court barred recovery on *Illinois Brick* grounds without addressing *AGC* at all. See also *In re Coordinated Pretrial Proceedings*, 691 F.2d 1335, 1340-41 (9th Cir. 1982) (holding that *Illinois Brick* precluded customers of non-conspiring competitors of defendants from claiming they were overcharged as a result of defendants' antitrust violation).

Here, too, the plaintiffs have sought to recover damages for savings that parties other than defendants might have passed on to them absent defendants' antitrust violation. But the Third Circuit has ignored the rule of *Illinois Brick* and has allowed plaintiffs to recover damages based on savings lost in transactions with non-parties. Had the Third Circuit applied the *Illinois Brick* rule as other courts of appeals have done, the steel companies' damages award would have been reversed.

C. AGC. The court of appeals' analysis of the *AGC* factors illustrates the importance of enforcing *Illinois Brick* as an independent limitation on recovery under § 4. *Each* of the three factors on which the court of appeals

relied to affirm the steel companies' standing was expressly rejected in *Illinois Brick* as a basis for allowing indirect purchasers to recover damages. First, the court of appeals stressed that "B&LE's antitrust activity directly impacted the steel companies," noting that the steel companies "were the sole customers" of the vessel companies and that as ultimate consumers they "bore the brunt of the increased costs." App. 51a. That same argument was made by the dissenters in *Illinois Brick*, and was rejected by the majority. "For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution." *Illinois Brick*, 431 U.S. at 749 (dissenting opinion).

Second, the court was impressed that "[t]here are no missing links in the causation chain here." App. 51a. The same is true in any indirect purchaser case. The fact that the Court in *Illinois Brick* and in *Utilicorp* was able to identify plaintiffs' precise place in the "chain of distribution" (431 U.S. at 726; 497 U.S. at 207-08) did not alter its conclusion that only the directly injured party had suffered "injury" under § 4.

Finally, the court argued that the goals of the antitrust laws were furthered by allowing customers denied the "benefits of price competition" to seek damages. App. 52a. Any indirect purchaser could make that claim. The Court acknowledged this concern in both *Illinois Brick* and *Utilicorp*, but held that the antitrust laws would be most effectively enforced if the indirect purchaser was not allowed to sue. *Illinois Brick*, 431 U.S. at 745-47; *Utilicorp*, 497 U.S. at 214-16. The only other factors discussed by the panel each weigh in favor of dismissing the steel companies' claims.[20]

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[20] The court below acknowledged the presence of "other victims" who "suffered direct antitrust injury," the overlap between the steel companies' lost savings on lake transportation costs and the vessel companies' lost profits, and the complexity of the steel companies' damages claims. App. 52a-54a.

In short, the court of appeals' decision permits courts to take the same factors that were rejected by this Court in *Illinois Brick* and *Utilicorp* and employ them, through the guise of a standing analysis under *AGC*, to allow indirect purchasers to recover. That decision cannot be reconciled with decisions of this Court and other courts of appeals. It is especially noteworthy that the panel would reach such a result in a half-billion dollar case that *admittedly* presents the twin concerns of duplicative damages and unduly complex economic theories that were central to the Court's holding in *Illinois Brick*. The Third Circuit's departure from settled law and the need to resolve the widespread confusion among the courts of appeals, particularly in a case of this magnitude, warrants plenary review by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1526/1586-1595/1627-1634

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.;
CONSOLIDATED DOCK AND STORAGE, INC.;
TOLEDO WORLD TERMINAL, INC.

vs.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Wills Trucking, Inc. and Toledo World Terminal, Inc., Appellants in 91-1526

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
Appellant in 91-1586

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.; CONSOLIDATED DOCK AND STORAGE, INC.; TOLEDO WORLD TERMINAL, INC.

v.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1587

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1588

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. CIVIL NO. 84-02079),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1589

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION ; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (Civil No. 84-02134),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1590

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1591

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1592

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1593

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1594

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY; and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1595

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

C.D. Ambrosia Trucking Company ("Ambrosia"), Appellant in 91-1627

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CKESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02079),

Republic Steel Corporation,
Appellant in 91-1628

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02134),

National Steel Corporation,
Appellant in 91-1629

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION, THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Jones & Laughlin Steel Incorporated,
Appellant in 91-1630

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Wheeling-Pittsburgh Steel Corporation,
Appellant in 91-1631

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Tauro Brothers Trucking Company,
Appellant in 91-1632

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Sharon Steel Corporation,
Appellant in No. 91-1633

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Erie-Western Pennsylvania Port Authority and Codan Corporation ("Erie"), Appellants in 91-1634

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued June 10, 1992

Before: MANSMANN, SCIRICA and ROTH, *Circuit Judges.*

(Filed May 27, 1993)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Industries involved in the transportation and manufacturing of iron ore are the adversaries in this complex multi-district antitrust litigation. Five steel companies, three dock companies and three trucking companies filed civil actions in various federal district courts, alleging that the railroad companies serving the lower Lake Erie industrial region conspired in violation of federal and state antitrust laws to preclude potential competitors from entering the market of lake transport, dock handling, storage and land transport of iron ore.[1] The cases

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[1] The steel company plaintiffs are Republic Steel Corporation, Jones & Laughlin Steel Corporation (which includes Youngstown Sheet and Tube Company), National Steel Corporation, Wheeling-Pittsburgh Steel Corporation and Sharon Steel Corporation. The dock company plaintiffs are Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), Toledo World Terminal, Inc., and David W. Reaney and Reaney Dock Company. The trucking company plaintiffs are Wills Trucking, Inc., Tauro Brothers Trucking Company, and C.D. Ambrosia Trucking Company. Toledo World and Wills Trucking are corporate affiliates and will be referred to as the Wills plaintiffs.

When the action commenced, the railroad companies named as defendants were the Baltimore and Lake Erie Railroad Company, ("B&LE"), Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, CSX Corporation, Pittsburgh and Lake

were consolidated and transferred to the United States District Court for the Eastern District of Pennsylvania for pre-trial proceedings.

The eventual trial was bifurcated into liability and damages phases. The liability jury reached a verdict against Bessemer and Lake Erie Railroad Company ("B&LE"), the sole remaining defendant, and in favor of all plaintiffs but one—David W. Reaney and Reaney Dock Co. The first jury was discharged and a new jury, empaneled for the damages phase, reached a verdict awarding all but one claim for damages. B&LE's motion for judgment n.o.v. was denied in most respects. Post-trial motions lodged by the Wills plaintiffs were likewise denied.

On appeal and cross-appeal, numerous issues have been raised. In its appeal, B&LE contends, as threshold arguments, that (1) the conduct complained of as violative of the antitrust laws was exempt from liability under the doctrine of *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), and the statutory immunity conferred by section 5a of the Interstate Commerce Act, 49 U.S.C. § 5(b) (1970); (2) some plaintiffs lacked standing under *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), and *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), to raise antitrust claims; and (3) the claims were time-barred by the federal statute of limitations and the doctrine of laches. B&LE also argues that the proof offered at trial did not establish that its misconduct caused damage to the plaintiffs. In addition, claims B&LE, the evidence of damages was too speculative to be sustained.

Erie Railroad Company, Consolidated Rail Corporation, Norfolk and Western Railway Company, Norfolk Southern Corporation, Penn Central Transportation Company and Penn Central Corporation. The claims against all of the defendants, except B&LE, were settled or dismissed before or during trial, leaving B&LE as the sole defendant.

Finally, as a post-verdict matter, B&LE asserts that post-judgment interest was calculated from the wrong date.

Cross-appeals include the issues of whether the district court erred in disallowing the steel companies' fraudulent concealment defense to toll the running of the statute of limitations and whether there was error in the district court's refusal to award prejudgment interest under Ohio law.

National Steel cross-appealed on the ground that judgment n.o.v. was improperly granted in favor of B&LE with respect to National Steel's investment cost damage claim.

Finally, the Wills plaintiffs claim that their Seventh Amendment right to a fair trial was violated because the district court allowed the damage phase jury to hear and evaluate liability evidence.

We will affirm, in most respects, the order of the district court. We will reverse the grant of judgment n.o.v. against National Steel and remand for entry of judgment for National Steel because the ground upon which it was based was not preserved by B&LE. We will also reverse the district court's denial of Wills' post-trial motions because as to these plaintiffs, the conduct of the bifurcated trial violated the Seventh Amendment. We will, therefore, remand for a new trial limited strictly to a calculation of damages suffered by the Wills plaintiffs.

I.

A. *Regulatory Background*

The Interstate Commerce Act ("the ICA") governs "any individual or joint rate . . . charged . . ." by the railroads. 49 U.S.C. § 15(1) (1970) repealed, Pub. L. 95-473, § 4(b), (c), October 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat.

427.[2] The enforcement arm of the ICA, the Interstate Commerce Commission ("the ICC"), is charged with regulating the rates filed and charges levied by the railroads in a manner consistent with the purposes of the ICA. 49 U.S.C. § 15(1) (1976).

Under the ICA and directly contrary to activity forbidden in other industries, the railroads were legally permitted to engage in joint rate-making activity. However, in 1944 the inevitable tension presented by the ICC's policy of condoning concerted action and the general prohibition against industry consortia embraced in the antitrust laws prompted the Justice Department to invoke the provisions of the Sherman Act in an effort to enjoin some railroad rate-setting practices. *See United States v. Association of American Railroads,* 4 F.R.D. 510 (D.Neb. 1945) (denying defense motion to dismiss). In that same year, the State of Georgia alleged that an eastern railroad conspiracy in restraint of trade caused an increase in freight rates throughout its state. *Georgia v. Pennsylvania Railroad Company,* 324 U.S. 439 (1945). Sitting as the court of original jurisdiction, the Supreme Court responded to the defendants' allegation that Georgia's complaint failed to state a cause of action, by holding that "regulated industries are not per se exempt from the Sherman Act," 324 U.S. at 456-47, and suit was permitted to proceed.

Congress responded by passing the Reed-Bullwinkle Act, ch. 491, 62 Stat. 472 (1948), (current version codified at 49 U.S.C. § 10706), authorizing the creation of rate bureaus which would provide a sanctioned forum for the railroads to set agreements on rates. In section 5a of the 1970 version of the Act, Congress ex-

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[2] The Interstate Commerce Act was originally enacted in 1887 and was codified and recodified with little change until its substantial revision in 1980 by the Railroad Revitalization and Regulatory Reform Act and the Staggers Rail Act. These changes are not implicated here.

pressly granted railroads antitrust immunity for any collective rate-making activity accomplished in accordance with the procedures described in the Act. 49 U.S.C. § 5(b). Unless and until "suspended or modified or set aside by the Commission or be disapproved . . . by a court," these rates are lawful as between the carrier and shipper. 49 U.S.C. § 15(2).

B&LE was a member of the Coal, Coke and Iron Ore Committee, an ICC-approved rate bureau. Through this vehicle the defendants established the rates of concern here. At issue is whether the railroads' rate-making activity occurred within the legal framework of the ICA. The plaintiffs do not challenge the original agreement or the defendants' right collectively to set rates pursuant to the terms and conditions of the agreement. Instead the anti-competitive activity charged here allegedly arises from the collective response of the members of the rate bureau to a technological innovation in the iron ore industry.

B. *Factual Background*

Given the jury verdict in favor of the plaintiffs, we review the evidence in a light favorable to their position.

The theory of the plaintiffs' case is that beginning approximately 25 years ago, B&LE conspired with its industry partners to eliminate competition and monopolize the transportation and handling of iron ore. The iron ore originates from mines in Michigan, Minnesota and eastern Canada. It is brought to the steel companies' plants by ship transport across the Great Lakes and is unloaded at railroad-owned docks along lower Lake Michigan, Lake Erie and the Detroit River.

The traditional method of unloading ore from the vessels, known as bulkers, was by the use of huletts, large cranes affixed to the docks. The huletts lifted the ore from the bulkers and either placed it in waiting railroad cars for immediate shipment or positioned it for later

movement to a storage facility. Some of the docks are located directly adjacent to steel mills, but most of the ore was reloaded at the dock onto land-based transportation, most often railroads, for delivery to the inland mills. The non-railroad docks were not competitors for this segment of the ore business because they were not equipped with huletts.

A change in ore producing technology catalyzed a different method of moving iron ore across Lake Erie. In the 1950s, some iron ore producers began to "pelletize" their ore. As the term implies, instead of a mudlike form, the iron was formulated into pellets. This innovation made possible the transport of the ore by means of self-unloading vessels, capable of unloading cargo by means of a conveyor belt without the use of a hulett.

Self-unloaders could carry greater loads than the conventional bulkers and could unload in significantly less time at docks which did not require special handling equipment. Using self-unloaders, non-railroad docks could now compete as unloading sites for iron ore, and could receive, store and tranship ore from self-unloaders at lower cost than railroad hulett docks because they did not need land-based unloading equipment and crews. In addition, demurrage charges, the amount assessed while equipment stands idle, were reduced. The non-railroad docks, in combination with self-unloaders, were able to compete directly with the railroad-owned docks for the iron ore transport market. The plaintiffs contend that the railroads, perceiving the threat presented by the existence of the non-railroad docks and unwilling to jeopardize their substantial investment in the off-loading equipment, plotted to halt the progress of self-unloader technology to maintain the railroads' dominance in the iron ore transport market.

Because the railroads also controlled access to their docks and provided inland transportation of ore from the docks only by rail, the self-unloader/non-railroad dock

system also compromised the railroads' monopoly on the inland transportation of iron ore. With self-unloaders discharging cargo at private docks, less costly trucks could haul the ore from the non-railroad docks and provide land transportation savings to the steel companies.

Roused by the possibility of the demise of the railroad industry as the literal mover and shaker of the iron ore transport business, its high ranking officials convened to discuss a course of action designed to circumvent the incorporation of self-unloaders into the iron ore industry. Railroad officials orally agreed that leases of railroad docks or facilities should be examined or modified to frustrate the efforts of non-railroad docks to handle ore from self-unloaders. They also agreed to refuse to provide competitively-priced inland rail service, *i.e.*, to publish commodity line haul rates for moving ore from such docks. Finally, it was agreed that railroad docks should assess the same handling charges for unloading ore from bulkers as from self-unloaders, regardless of the extent of service performed.

The words were converted into action. To effectuate the goal of market preclusion, the railroads used coercion to enforce adherence to the agreement to foreclose competition from private docks. B&LE and its co-conspirators did indeed restrict the lease and sale of railroad-owned dock property and boycotted non-railroad docks. These activities eliminated much of the economic incentives to use self-unloaders. By impeding the progress of the private dock system, the railroads were also effective in foreclosing competition from trucks.

C. *The Litigation*

On Ocotber 13, 1981, a federal grand jury returned an indictment charging B&LE and other railroads operating docks and inland rail lines with criminal conspiracy in violation of section 1 of the Sherman Act. B&LE pled nolo contendere and was convicted and fined. The con-

viction was affirmed on appeal. *United States v. Bessemer & Lake Erie Railroad Co.*, 717 F.2d 593, 602 (D.C. Cir. 1983).

After the indictment, between 1982 and 1984, the original complaints were filed in this civil action in various federal district courts. Seeking recovery under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, section 4 of the Clayton Act, 15 U.S.C. § 15, and the Ohio Valentine Act, Ohio Revised Code §§ 1331.01-1331.99, the plaintiffs claimed that a conspiracy existed among the defendant railroads to delay the utilization of self-unloading vessels for the transportation of iron ore. On April 17, 1984, the Judicial Panel on Multidistrict Litigation consolidated the ten cases.

The steel company plaintiffs requested damages for the savings lost to them, alleging that the railroads' anti-competitive behavior generally denied them savings that would have resulted from swifter development of self-unloader technology. Specifically, the plaintiffs identified as compensable: (1) savings resulting from lower dock handling rates from private commercial docks had the self-unloader industry been more dynamic; (2) savings from lower dock handling rates at the railroad docks had there been competition from private docks; (3) savings from lower trucking rates had their market entry not been restrained; (4) savings lost because of the railroads' failure to publish commodity line haul rates and (5) in a catchall provision, the savings it would have enjoyed had the steel companies had the option to choose the most efficient and economical combination of transportation alternatives.

The dock company plaintiffs claimed injury due to the railroads' refusal to permit them entry into the iron ore unloading business. Their damage claims thus represented the profits that their industry would have realized had they been able to break into the market. The trucking companies' claim for damages is similar. Had they not

been precluded from entering the market of the land transport of ore, they would have engaged in such operations and realized significant profits.

In a series of pre-trial rulings, the district court dismissed the steel companies' claims for the damages based on the allegation that, absent the conspiracy, these plaintiffs would have paid lower rates for costs associated with the transportation of ore. The court ruled that these claims were barred by *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) (antitrust liability in private action cannot be predicated on rates approved by the ICC). The district court, however, permitted to proceed to trial those damage claims that resulted from "defendants' elimination of competitive non-railroad dock facilities." These claims were not considered rate-related, because they required proof that the defendants conspired to exclude low cost competitors from the market. The court determined that *Keogh* did not bar the damage claims of the dock and trucking companies because they were competitors, and not customers, of the railroads.

In motions to dismiss, the defendants challenged the standing of some classes of plaintiffs to pursue antitrust claims. The court dismissed the steel companies' damage claim that was based on the theory that had the conspiracy not delayed the use of self-unloading vessels, the steel companies would have paid vessel companies a lower rate for lake transportation. Applying *Illinois Brick Co. v. Illinois*, 431 U.S. 920 (1977), and *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the district court concluded that claims for such lake freight savings were indirect, potentially duplicative and too speculative. The court held that because the steel companies were only *potential* customers of non-conspiring competitors, (the vessel companies), damages could be ascertained only by speculating when the vessel companies would have begun using self-unloaders absent a conspiracy. Assessment of damages would also require additional conjecture related

to the rates the private docks would have charged to handle the self-unloaders.

Because the steel company plaintiffs had also pled that they were *directly* involved in the ownership operation of self-unloaders, however, the court held that self-unloader damages could sustain a standing challenge. Similarly, the steel companies' damages resulting from the inability to use non-railroad docks were not barred because the court perceived that these damages arose from the inability to seek lower prices from competitors who were either denied participation or experienced entry delay in the relevant market due to the illegal conspiracy.

On the issue of whether application of the federal statute of limitations precluded recovery or whether the statute was tolled because the railroads fraudulently concealed the conspiracy, the district court granted B&LE's motion for summary judgment against the steel company plaintiffs and Erie but denied it against Wills and the trucking company plaintiffs. The court ruled that the steel company plaintiffs and Erie knew or should have known about the conspiracy, thereby denying the fraudulent concealment defense and limiting recovery to damages sustained within four years of the commencement of this suit. The period was, however, tolled during the pendency of the related criminal case.

The consolidated trial was bifurcated into liability and damage phases. After six weeks of trial, the liability phase concluded in a jury verdict in favor of all the plaintiffs except David W. Reaney and Reaney Dock Company. The jury's findings, as set forth on special verdict forms, are summarized as follows:

The conspiracy in which B&LE participated was a material cause of injury to each steel company plaintiff. Each injury resulted from foreclosure or delay in utilizing self-unloading vessels for the delivery of iron ore and from the inability to use non-railroad docks to handle iron ore.

With regard to the dock companies, the jury found, first, that Erie's injuries resulted from acts designed to prevent it from purchasing or leasing dock property at Erie, Pennsylvania, and from acts designed to foreclose competitive inland rail service from that dock. Second, the injury found that the Wills' injuries resulted from acts which precluded it from purchasing or leasing dock property at Toledo, Ohio and from trucking ore inland from that dock. The jury rejected Wills' claims that it had been injured by the railroads' refusal to sell or lease other dock property.

As to the trucking companies, the jury found that Ambrosia Trucking Company's injury resulted from acts which prevented or delayed the handling of iron ore by non-railroad docks which would have permitted the trucking of ore. The jury denied the recovery of damages on claims that B&LE interfered with Ambrosia's trucking from railroad docks and from one non-railroad dock in Ashtabula, Ohio.

The jury further found that Tauro Brothers Trucking Company's injury resulted from the foreclosure or delay in the utilization of self-unloading vessels to bring iron ore to docks that granted access to truckers, as well as the inability of steel mills to use to their fullest capacity non-railroad docks to which trucks were allowed access. The jury rejected Tauro's claim that it had been injured by unlawful acts designed to prevent trucking from railroad docks.

The court discharged the liability jury and subsequently empaneled a new jury for the damages phase. It reached a verdict awarding all but one claim of damages. The steel companies were awarded damages measured by the difference between the lower prices that would have been charged by the excluded competitors and the higher prices actually paid. Damages sustained by the docks and the trucking companies were measured by the profits that each would have earned on the businesses from which they had been excluded. Wills Trucking Company and

Toledo World Terminal were awarded only nominal damages ($1) on their claim that the railroads refused to sell or lease dock property to them.

On February 27, 1991, the district court denied, in substantial part, B&LE's motion for judgment n.o.v., rejecting all of B&LE's arguments except that concerning National Steel's investment cost damage award. First, the court upheld the jury's determinations that 1) B&LE had violated the antitrust laws by conduct which was not immune, *i.e.*, not protected by regulatory statutes or Supreme Court decisions, notably *Keogh*; and 2) the plaintiffs' damages were attributable to this conduct.

The court next rejected B&LE's argument that the plaintiffs lacked standing to bring this action. Specifically, the court held that no serious standing issue arose with respect to the steel companies' dock handling awards nor with respect to the claims of the Erie or trucking company plaintiffs. The court, with admitted reservation ("although with less than complete confidence"), App. at 2108, also held that the steel companies had standing to seek self-unloader damages since the steel companies had assumed responsibility for financing and operating ore carrying vessels.

The district court also denied B&LE's argument that certain of the plaintiffs' Sherman Act claims were barred by the four-year statute of limitations and that laches barred all of the plaintiffs' Ohio Valentine Act claims. The court found that the injuries did not result solely from pre-limitations periods acts and that *Zenith Radio Corp. v. Hazelton Research, Inc.*, 401 U.S. 321 (1971), did not require plaintiffs to trace each item of damages to specific overt acts within the limitations period. The court ruled alternatively that the plaintiffs' Sherman Act claims fit within the *Zenith* exception that permits assertion of claims which were too conjectural to have been litigated earlier.

With respect to the Valentine Act claims, the district court held that under Ohio law, an equitable defense does

not apply to actions at law for damages; but that, in any event, the jury's findings that the railroads acted affirmatively to conceal their conspiratorial activities, as well as B&LE's failure to show that significant prejudice attributed to any delay in filing suit, ruled out a laches defense.

The court further rejected B&LE's argument that plaintiffs' damages were not caused by the unlawful conspiracy. The court noted that throughout both phases of the trial B&LE vehemently argued and sought to prove that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy. The court stated that these factual issues were properly submitted to the jury and that viewing the record in the light most favorable to the verdict winner, there was no doubt that the evidence supported the jury's determinations.

B&LE has appealed the judgment of the district court. The plaintiff steel companies have cross-appealed on two issues: whether the district court erred in granting summary judgment in favor of B&LE on the statute of limitations concealment issue when it ruled that the steel companies, as a group, had knowledge of facts which would have reasonably given them notice of the conspiracy. Second, the plaintiffs argue that the district court erred in refusing to award them prejudgment interest under Ohio law. The Erie dock company and Ambrosia Trucking join in cross-appealing the issue of prejudgment interest.

As noted, the district court granted B&LE's motion for judgment n.o.v. with respect to National Steel's claim for investment cost damages. The court held that National Steel's claim was not recoverable under the antitrust laws because it represented inflation, a non-compensable loss. National Steel has cross-appealed on this issue.

The Wills plaintiffs, although prevailing on the issue of liability, were only awarded nominal damages. In their

cross-appeal, the Wills plaintiffs contend that the district court impermissibly alolwed the damage phase jury to re-examine a liability issue—the fact of damage of the Wills' antitrust claim—in violation of the Seventh Amendment. The Wills plaintiffs also argue that even if nominal damages were appropriate, the district court erred in not trebling them.

We turn now to discussion of each of the issues presented, beginning with the appeal brought by B&LE.

II. *B&LE's Appeal*

A. *Antitrust Immunity*

Pursuant to *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156 (1922) and 49 U.S.C. § 5(b) (1970), railroads may engage in some joint activity which might otherwise run afoul of the antitrust laws. A major issue permeating this case is whether the railroads' activity, upon which the plaintiffs based their treble-damages causes of action, is protected by *Keogh* or by statute. It is a question of law over which we exercise plenary review.

1. *The Doctrine of Keogh*

In *Keogh*, a shipper sued a railroad carrier for participating in a conspiracy to fix rates in violation of the Sherman Act. The ICC had previously approved the rates. The Supreme Court held that even though the ICA does not immunize regulated carriers from government antitrust prosecution, it does preclude treble damage awards to private litigants. The Court gave a number of reasons for its holding. First, because the subject rates were accepted by the ICC, they were the "legal" rates. The Court believed it inconsistent that Congress, in enacting the ICA, would intend that carriers could be sued for price-fixing when they were charging the rates required by law. 260 U.S. at 162-63. Second, if Keogh were to prevail, he would receive a lower rate not available to other shippers. This situation would create, in effect, a

discriminatory rebate, avoidance of which was one of the reasons for the ICA. *Id.* Third, to establish injury, Keogh would be put to the task of proving hypothetical lower rates which would have been charged in the absence of the conspiracy and the acceptability of those rates to the ICC. Additionally, Keogh would have to overcome the problem of speculative calculation of damages. *Id.* at 164.

The Court re-examined the *Keogh* doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau Inc.*, 476 U.S. 409 (1986). In *Square D*, shippers brought antitrust actions against motor carriers and their rate-making bureau, claiming that the carriers and the bureau had conspired to fix rates without complying with their ICC-approved rate agreement. The shippers claimed entitlement to the difference, trebled, between the rates actually paid and the rates which would have prevailed in an open market. The district court dismissed the actions under the authority of *Keogh*.

The Court of Appeals for the Second Circuit affirmed. *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1352 (2d Cir. 1985). The court also noted a possible distinction between rate-making activity, shielded by *Keogh*, and other, unprotected, concerted activity. The *Square D* shippers had alleged that the defendant carrier rate bureal had: (1) used an unauthorized Committee to "set rates and inhibit competition"; (2) ignored "the notice, publication, public hearing, and recordkeeping requirements of its [freight agreement] and ICC regulations"; (3) strategized "threats, retaliation, and coercion against [rate bureau] members to inhibit independent actions"; and, (4) employed "pressures, threats, and retaliation to interfere with independent actions." *Square D*, 476 U.S. at 412-13.[3] The court of appeals identified these

[3] According to one commentator, secret price fixing and retaliation against carriers exercising independent action were not unusual in the 1960s and 1970s, yet the ICC was apparently unaware

four allegations as potential support for a claim that the carriers jeopardized the shippers' economic health by blockading their ability to sell their goods. "Thus, on remand, appellants should be afforded an opportunity, if they believe the facts justify it, to amend their complaint to state a proper claim for damages." *Square D*, 760 F.2d at 1366.

On certiorari, the Supreme Court acknowledged that while the joint setting of rates is protected activity under 49 U.S.C. § 5(b), the "statute strictly limits the exemption to actions that conform to the terms of the agreement approved by the ICC." *Square D*, 476 U.S. at 413-14. The Court also recognized that "nothing in the language of the Interstate Commerce Act, moreover, necessarily precludes a private antitrust treble damages remedy for actions that are not specifically immunized within the terms of the Reed-Bullwinkle Act," 476 U.S. at 414. The Court nonetheless determined that, under *Keogh*, the *Square D* shippers could not bring a treble damages action because:

> *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation.

Id. at 422. The Court then affirmed the dismissal of the complaints, albeit without specific discussion of whether

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of such activity until government and private antitrust lawsuits focused upon the problem. Dissatisfaction with the ICC's overall performance led to the 1980 enactment of the Staggers Rail Act which substantially deregulated rail and motor transportation.

The legislation endorsed greater competition as the best way to stimulate transportation industry development, accomplished by circumscribing the immunity of a rate bureau's activities and by substantially removing from the ICC its rate setting function. This 1980 statute did not specifically overrule *Keogh*, but significantly undermines its central rationale. *See* William Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988).

Keogh protected the carriers from liability for concerted, non-rate activity.

Thus the question left unresolved by *Square D* remains for us to answer today: Does *Keogh*, with its reaffirmation in *Square D*, preclude treble-damage recovery for private litigants claiming that members of a regulated industry conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry? As with many of the other issues before us, our response differs depending upon the particular group of plaintiffs and the damages sought.

a. *The Steel Companies* [4]

The district court, without the benefit of the Supreme Court's *Square D* opinion, relied upon *Keogh* to dismiss the plaintiffs' original claims for damages based upon rates charged by the defendant railroads. According to the district court, two steel company antitrust claims survived this dismissal:

> (1) [a claim] that [the steel companies] could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) [a claim] that [the steel companies] could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks. In my view, plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination

[4] National Steel, which invested in and operated its own self-unloading vessel, was a competitor, not a customer of the railroads. Thus, as to the various immunity issues, it stands in the shoes of the dock and trucking companies and not the steel companies.

> of transportation alternatives come within these two categories.

App. at 234 (footnote omitted).[5]

In a subsequent order, the district court dismissed any damage claims that would require estimating what rates the ICC would have accepted, an estimation forbidden by *Keogh*. According to the district court, the sole remedy for these claims would be before the ICC. App. at 362-63.

As to the surviving claims, the district court reasoned:

> With respect to *Keogh* . . . [p]laintiffs need not prove what prices, but for the conspiracy, defendants would have charged; plaintiffs need prove only that, in the context of tariffs that I must accept as legitimate, defendants' exclusionary activities and other antitrust violations slowed penetration of the relevant markets by defendants' competitors. Thus, plaintiffs' damages do not depend on proof of price-fixing by defendants, which *Keogh* would bar, but on proof that defendants conspired to exclude low cost competitors from the market, which does not implicate the ICC's exclusive jurisdiction and therefore is not barred by *Keogh*. In short, as Judge Friendly as explained, '[a] shipper may recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs . . . .' *Square D*, 760 F.2d at 1365.

App. at 372-73.

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[5] The district court elsewhere described these claims in terms of damages resulting from the defendants' conduct as:

> damages directly resulting from defendants' elimination of competitive non-railroad dock facilities from the market of providing unloading and trans-shipment services to plaintiffs . . . [and] damages directly resulting from the defendants' elimination of competition from trucking in the market of inland transportation services to plaintiffs.

App. at 372.

The district court also discussed Republic Steel's claims for damages emanating from the delay in the construction and use of Republic's own dock facilities. To apply *Keogh* to bar this complaint, opined the court, would allow a blockade of a competitor to escape scrutiny. This would overextend *Keogh's* reach and could produce a rule that one who pays for services governed by ICC tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service.

Before the liability jury, the plaintiffs presented evidence of the railroads' agreements to restrict the sale and lease of dock property, boycotts of unregulated docks, refusals to handle self-unloaders in a way that would make economic sense for a steel company to utilize them, and coercion to prevent independent action. Indeed, the district court described the forcefulness of the evidence against B&LE as follows:

> Literally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy, dating back to at least 1950, to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold in the transportation of ex-lake iron ore. The record is so clear and complete, in fact, that it can be read to suggest that the participants may have genuinely believed that the antitrust laws did not apply to railroads at all.

App. at 2102.

We conclude that the district court correctly characterized B&LE's anti-competitive activity as market preclusion, and *Keogh's* protective rule cannot apply to forbid recovery for the resulting economic detriment. As the Supreme Court has succinctly stated, *Keogh* merely prevents private shippers from sustaining an award of treble damages by claiming that ICC-approved rates were the product of an antitrust violation. *Square D*, 476 U.S. at 422. That statement of Keogh's protection does not

preclude liability based on non-rate anticompetitive activity. Indeed, the steel companies' case involves damage claims based on non-rate activity that targeted potential low-cost competitors.

We recognize that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with *Keogh*, however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies was the absence of the lower-cost combination. In contrast, the Supreme Court in *Keogh* made it clear that "the instrument by which Keogh is alleged to have been damaged is rates approved by the Commission." 260 U.S. at 161. As a result,

> [t]he burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action.

Keogh, 260 U.S. at 163-64.

The proof required to show the harm alleged here thus differs from that deemed objectionable in *Keogh*. In this case, the plaintiffs showed that the railroads conspired to protect their stronghold in the ore transport market by blocking entry by low-cost competitors, not that the railroads charged an unlawful rate.

The facts in *Square D* also differ from those proven at trial here. The *Square D* plaintiffs contended that un-

lawful conduct caused shipping rates to be higher than a freely competitive market. They sought treble damages measured by that difference. Thus, the *Square D* plaintiffs, like the plaintiff in *Keogh*, grounded their damage claims on the allegation that the motor carriers, a group regulated by the ICC, would have charged a lower rate absent the conspiracy. Here, the question of hypothetical lower rates is ancillary. If the self-unloader/private dock/trucking triad had been permitted to develop, conceivably the steel companies would no longer be captive customers of the railroads and the rates charged by them would not be so pervasive a consideration. Admittedly, to remain competitive, the railroads would no doubt be forced to lower their rates, but the goal of the antitrust laws is to provide an open and competitive market place. It was the railroads' hindering the development of the market which defines this antitrust litigation.

The opinion of the Court of Appeals for the Sixth Circuit in *Pinney Dock and Transport Corp. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), while not binding on us, does provide some guidance. The *Pinney Dock* case involves the same defendants and the same conspiracy at issue here. The plaintiffs were a dock company, Pinney, and a builder of self-unloading vessels, Litton. On motions to dismiss, the court of appeals held that *Keogh* would bar claims based on the handling and line-haul rates charged by the railroads. *Id.* at 1457. However, the court of appeals also deemed certain claims outside the scope of the *Keogh* doctrine. These claims included Litton's contention that the defendants refused to permit Litton to purchase, lease or use dock facilities that could have accommodated Litton's self-unloading vessels and the contention of both plaintiffs that "defendants used harassing tactics and spurious challenges to try to forestall legitimate business activities of competitors." *Id.* After a full trial, we are in a different procedural position than that of *Pinney*

Dock. We have definite evidence of the railroads' refusal to handle self-unloaders at their docks, restrictions on the sale and lease of dock property to unregulated entities, boycotts of unregulated docks. and intra-industry coercion claims which mirror those deemed by the court of appeals in *Pinney Dock* to escape *Keogh*. Because the railroads derailed their potential competitors, the steel companies could not use alternative, lower-cost, private docks, and thus they lacked the economic incentive to develop self-unloaders. The by-product of this delay in introducing these vessels was that the steel companies were compelled to continue to pay the railroad fixed rates. Even strained to simplification, the railroads' anti-competitive behavior involved far more than the assessment of rates. The mere measures of damages, which begins with an ICC-approved rate, does not define the nature of the conspiracy.

Although we conclude from the evidence produced that the steel company plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims, the question remains whether the district court properly instructed the jury concerning the types of rate activity protected by *Keogh*. In a liability segment of the trial, the district court charged on *Keogh*, in part, as follows:

> What is forbidden by the antitrust law are joint actions, actions taken pursuant to an agreement which restrains trade unreasonably—that is, which adversely affect competition—and which are not within the protection, the immunity, granted by the rate bureau proceeding—that is to say, which are not rate related.
>
> * * * *
>
> But once a rate is being charged pursuant to a duly filed tariff which has not been disapproved by the Interstate Commerce Commission, then it is conclusively presumed so far as the law is concerned that the charge is a reasonable one. And what that

> means is that nobody can claim damages under the antitrust laws or any other law—no shipper who pays railroad rates, who pays freight charges to a railroad—can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been.

App. at 4981-82.

The district court also instructed the jury concerning B&LE's good faith and regulatory climate defenses and informed the jury that, if the company's conduct was consistent with the overall policies of the ICC, it was not in violation of the antitrust laws. App. at 5002.

B&LE takes issue with the charge, arguing that, under the *Keogh* doctrine, no matter how unlawful the means to fix or maintain rates, and no matter how anti-competitive those means may be, the tariff rates are the legal rates and cannot give rise to liability for antitrust damages. We disagree. *Keogh* does not give ICC-regulated industries carte blanche to preclude competition. The instruction, as a whole, recognized this principle and so did not misinform the jury as to the scope of the *Keogh* doctrine's protection.

In sum, we conclude that *Keogh* and *Square D*, prohibiting treble-damage recovery for private litigants based upon rate-related activity, cannot be applied here to deny antitrust recovery to the steel companies.

b. *The Dock and Trucking Companies*

The dock companies and trucking companies argue that *Keogh* does not bar their damage awards because *Keogh* and its progeny apply only to customers and not to competitors.

We have held that *Keogh* does not apply to claims of competitors. In *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114

(3d Cir. 1979), we stated that "the filed tariff rule has little or nothing to do with [defendants'] duties under the antitrust laws toward its competitors . . .; competitors are not the intended beneficiaries of the rule of public utility regulation." *Id.* at 1121. We then distinguished *Keogh* as follows:

> In this case the plaintiff is not suing in the capacity of a customer for communication services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the Section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

Id. at 1122; *see also Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985); *Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). *But see Pinney Dock*, 838 F.2d at 1457 (applying *Keogh* to bar competitors' claims).

Although in *Essential Communications* we dealt with regulation of a utility by the FCC rather than of a common carrier by the ICC, our reasoning there is forceful here and we will apply this precedent. The section 4 claims of the dock and trucking companies are therefore not impacted by the *Keogh* rule.[6]

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[6] B&LE contends that the Supreme Court applied *Keogh* to bar suits by a competitor in *Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439 (1945). In that case, the state of Georgia alleged that the defendant railroads had "fixed arbitrary and non-competitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other states over the

2. *Section 5a Immunity and the Doctrine of Primary Jurisdiction*

Collective rate-making activity by regulated railroads is also afforded a measure of protection by section 5a of the Interstate Commerce Act:

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect

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ports of Georgia." *Id.* at 443. Georgia sued both in its *parens patriae* capacity and as owner of a railroad and other public institutions. *Id.* at 447. Although Georgia's ownership of a railroad placed it in competition with the defendants, the court clearly focused on Georgia's *parens patriae* claim and treated the injury to the state as proprietor merely as "make weight." *Id.* at 450.

In dismissing Georgia's claims for antitrust damages, the Court held:

> We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. . . . The [*Keogh*] Court held . . . [t]he legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." 260 U.S. p. 163.

324 U.S. at 453.

Despite B&LE's diligence in presenting the pleadings in *Georgia* to support its cast of the case as one between competitors, it is obvious that in rendering its decision the Court's focus was on Georgia's claims as a customer. We, therefore, do not construe *Georgia* as Supreme Court precedent to apply *Keogh* to bar competitor suits.

> to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

49 U.S.C. § 5b(9) (1970). B&LE argues that, under the doctrine of primary jurisdiction, the district court should have referred to the ICC the question of whether the railroads' activity was immune under section 5a. However,

> [t]he doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts.

United States v. Bessemer & L.E. R. Co., 717 F.2d 593, 599 (D.C. Cir. 1983) (footnotes omitted), *quoting Cheyney State College Facility v. Hufstatler*, 703 F.2d 732, 736 (3d Cir. 1983). *Cf. United States v. Western Pacific Railroad*, 352 U.S. 59, 64 (1956) ("No fixed formula exists for applying the doctrine of primary jurisdiction"). A district court's decision not to submit an issue for initial determination by the agency will be reversed only for an abuse of discretion. *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc.*, 856 F.2d 546, 549 (3d Cir. 1988).

In *Pinney Dock*, the Court of Appeals for the Sixth Circuit decided that whether the ICC-approved rate bureau agreement had been violated and thus whether section 5a immunity applied "should be addressed, at least first, to the wisdom and expertise of the ICC." 838 F.2d at 1459. In the related criminal antitrust case, *United States v. Bessemer & L.E.*, 717 F.2d at 600, in which B&LE pled *nolo contendere* and then appealed the sufficiency of the indictment, the Court of Appeals for the Second Circuit reached a different conclusion, holding

that "the activities described in the indictment do not fit within the narrow 5a privilege." 717 F.2d at 600.[7] We agree with the Court of Appeals for the Second Circuit that the conduct alleged and proven violated both the substantive and procedural requirements of section 5a. We therefore conclude that the district court exercised sound discretion in not referring the section 5a immunity issue to the ICC.

B&LE then argues that the jury instruction, particularly the district court's equation of the agreement not to establish line haul rates from non-railroad docks to an illegal refusal to deal—a rate-related activity subject to a section 5a immunity—manifestly prejudiced their case.

In the relevant portion of the charge concerning the refusal to deal, to which the defendant has lodged a specific objection, the district court instructed as follows:

> Now, I mentioned that we have various claims relating to the alleged agreement not to establish line haul rates from non-railroad docks and not to allow the use of hopper cars by the steel companies in ways that would enable the trucking companies better to compete. A whole set of claims by various plaintiffs have to do with this allegation that the railroads refused to deal—that is to say, refused to enable the private docks to be established.
>
> I mentioned earlier that each railroad acting independently had a perfect right to decide whether

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[7] To reconcile its holding with that in the *United States v. Bessemer & L.E.* case, the court of appeals in *Pinney Dock* drew a distinction between the criminal enforcement role of the United States and the remedial nature of the ICC's jurisdiction. *Pinney Dock*, 838 F.2d 1460-61, n.15. We, to the contrary, do not find these role classifications as indicative of whether the court properly exercised its discretion in retaining jurisdiction. The same conspiratorial conduct described in the criminal indictment is the subject of this civil antitrust suit.

> to release the property to another company or not, but that it would be a violation of the antitrust laws for them to get together and agree that none of them would lease land to a private dock that could be used for a private dock or that could accommodate self-unloader vessels or that could be used by trucking companies.

App. at 4996.

Reading, as we must, the jury instructions as a whole, we find that the district court competently charged the jury regarding the scope of immunity afforded concerted railroad activity under the Reed-Bullwinkle Act.

The district court did not, as B&LE contends, tell the jury that failure to establish line haul rates amounted to a boycott. Instead, the court recounted the plaintiffs' allegations that certain railroad activities were refusals to deal and informed the jury that it must decide whether or not the railroads did conspire to foreclose private dock competition. There is nothing erroneous about this charge.[8]

B. *Standing*

In addressing the "standing" of parties to bring a claim under § 4 of the Clayton Act, the Supreme Court has focused on the nexus between the antitrust violations and the plaintiff's harm and on whether the harm alleged is of the type for which Congress provides a remedy. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982).[9]

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[8] B&LE, citing, as authority, 49 U.S.C. § 10706(a)(3)(C)(ii) of the Staggers Act, also challenges the issue's submission to the jury in the first instance. This issue has not been preserved for review, nor would it be of merit. The Staggers Act, enacted in 1980, has no application to this case.

[9] In *Alberta Gas Chemicals Ltd. v. E. I. DuPont deNemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059

In determining that the plaintiffs had standing here, the district court focused on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Supreme Court held that § 4 does not generally permit indirect purchasers to sue on a "pass-on theory", that is, a theory that illegal overcharges have been passed on through a chain of distribution. Three important policies supported this holding: avoiding the risk of multiple liability for defendants, avoiding evidentiary complications in identifying affected parties and measuring their damages, and avoiding the difficulties of managing large and complex suits. *Id.* at 741, 745.[10] Later, in *Blue Shield of Virginia v. McCready*,

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(1988), we addressed whether antitrust injury and antitrust standing are distinct doctrines:

> It has been suggested that although standing is closely related to antitrust injury, the two concepts are distinct. Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss. However, in the sense that plaintiffs who sustain no antitrust injury may not recover, they may be loosely said to lack standing. (Citations omitted.)

Id. at 1240.

[10] In *Illinois Brick*, a defendant manufacturer of bricks sold its product to masonry contractors, who provided the materials to building contractors. The contractor incorporated the bricks into buildings owned by the plaintiffs, numerous government entities. The plaintiffs claimed that they were injured by the prior purchasers' payment of excessive prices of the bricks charged by the manufacturer. The Court held that § 4 did not permit these indirect purchasers, with two narrow exceptions, to recover for the overcharge passed through the chain of distribution. The Court relied heavily on its earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that a seller who imposes an illegal overcharge on a direct purchaser cannot escape antitrust liability by arguing that the first purchaser passed on the illegal overcharge by increasing the prices it charged for the products when it sold them to the public. In *Hanover Shoe*, the Court rejected the pass-on theory for a seller and in *Illinois Brick*

the Court discussed the range of § 4 plaintiffs, and while recognizing "a point beyond which the wrongdoer should not be held liable", *McCready*, 457 U.S. at 477, the Court also discouraged "engraft[ing] artificial limitations on the § 4 remedy", *id.* at 472.

In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), the Supreme Court synthesized its prior decisions and outlined a multifactor inquiry to determine standing questions. Although the development of the doctrine is important to understanding the concerns of this Court in granting or denying, it is the *AGC* analysis —the most recent, comprehensive and relevant statement by the Court—which will resolve the standing question here. We exercise plenary review over application of the legal principle of standing.

1. *B&LE's Standing Arguments*

B&LE challenges the standing of Republic, Wheeling-Pitt and J&L to claim "lake transport damages," that is, damages resulting from the steel companies' higher cost of shipping ore via vessel companies during the conspiracy-induced delay in introducing low-cost self-unloaders.[11] B&LE characterizes these payments of the

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made the symmetrical decision, consistent with *Hanover*, to disallow an offensive use of the theory.

Although *Illinois Brick* is often cited as the standard bearer of antitrust standing cases, we note that the Court specifically stated that "we do not address the standing issue. . . ." 431 U.S. at 728 n.7. Instead, the Court based its holding on the grounds of remoteness of injury and defined this consideration as analytically distinct from the issue of standing.

[11] National Steel Corporation, which owned and operated self-unloader vessels, offered substantial evidence that their intent and readiness to enter into the lake transportation business was frustrated by the conspiracy. National Steel actually purchased its own self-unloading vessel, the *Stinson*, in 1974. Because National Steel transported its own iron ore, rather than contracting with

steel companies to the vessel companies as "inherently indirect" and argues that *Illinois Brick* and *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), which hold that only those who suffer direct injury have standing to seek antitrust damages, prevent the steel companies from asserting a § 4 claim for lake transport damages.

B&LE also challenges the steel companies' standing to seek damages based on the difference between the dock handling rates that they actually paid to the railroad docks and Pinney Dock [12] and the rates that they would have paid in an open and competitive market.[13] B&LE contends that the amount of savings the docks would have passed on to the steel companies presents problems of double recovery and complex apportionment of damages condemned by the Supreme Court in *Illinois Brick*.[14]

The district court resolved the standing issue in its post-verdict opinion by concluding, with reference to the "indirect purchaser" rule of *Illinois Brick*, that the steel companies' de facto ownership of bulker vessels allowed

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outside vessel companies, it did not offer evidence concerning lake transport damages. Also, because it was a vessel owner, notions of indirect injury concerning dock handling charges do not apply to National Steel. Further, National's claim is not jeopardized by the threat of overlapping damages as no other plaintiff suffered this distinct type of injury.

[12] Although Pinney was a privately owned dock, the plaintiffs claimed that the rates charged by it were artificially inflated by the conspiracy. According to the plaintiffs, because Pinney was the only private game in town, it was not required to set its prices based upon competition from other privately owned docks.

[13] In addition to the three steel companies awarded lake transport damages, Sharon Steel and National Steel were awarded dock handling damages.

[14] Because the private dock companies themselves were direct competitors of the railroads and because they were injured by the conspiracy's goal to preclude them from market entry, no standing problem is posed by their quest for damages.

the jury to conclude reasonably that, but for the conspiracy, the steel companies would have become similarly involved with self-unloaders. Ownership of the vessels, reasoned the court, translated to direct cost reduction of the steel companies' cost related to the movement of ore.

Although de facto ownership of the vessels might well relieve that steel companies from dismissal under *Illinois Brick*, we conclude that the standing requirement is satisfied under a different rationale.[15] The Supreme Court's cumulative pronouncements concerning directness of injury in antitrust cases mandates a more complex and differently focused inquiry.

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[15] The three companies averred in discovery that they were not in the business of purchasing, leasing, chartering, hiring or investing in vessels in the transshipment of bulk commodities over the Great Lakes. Indeed, the district court originally dismissed the self-unloader damage claims asserted by the steel companies, but gave the steel companies the opportunity to amend their complaints to allege the requisite ownership. To avoid a subsequent dismissal, the steel companies amended their complaint to allege that they had ownership interests in the vessels. However, the steel companies have not provided any record reference which points to an intent or preparation on their part to acquire self-unloaders. The only evidence of de facto ownership of the vessels that was offered was admitted during the damages phase of the trial. Nor were we directed towards evidence identifying the specific of contractual relationships that would indicate ownership interests by means of either significant financing or other proprietary rights.

Moreover the jury was not required to find that the steel companies intended to acquire self-unloaders and were prevented by the conspiracy from doing so. The specific question submitted to the jury was whether the plaintiffs suffered antitrust injury from "foreclosure and delay in the *utilization* of self-unloading vessels for the delivery of iron ore." (Emphasis added.) True, the term "utilization" could be read to encompass an "ownership" determination, but, given the specific nature of the district court's reliance on the finding to confer entitlement to recovery, a definite statement by the jury that the lease and contracts conferred de facto ownership would be necessary. Given the evidence, we express concern that such a finding is supported.

2. *Associated General Contractors, Inc. v. California State Counsel of Carpenters*

In *Associated General Contractors, Inc. v. California State Council of Carpenters* (*"AGC"*), the Court reviewed concerns addressed in previous cases [16] and set forth an integrated § 4 "standing" analysis. In *AGC*, unions representing California construction workers sued an association of employers with whom the union had collective bargaining agreements. The complaint charged the association and its members with coercing some employers into doing business with non-union contractors and subcontractors. In assessing the union's standing to sue, the Court did not distinguish between antitrust standing and antitrust injury.[17]

Instead, the Court provided a number of factors to consider in § 4 actions to determine if the plaintiff has suffered an injury which bears a causal relation to an alleged antitrust violation. These factors provided a theoretical framework for courts to utilize when presented

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[16] *See generally* James R. McCall, *The Disaggregation of the Damages Requirement in Private Monopolization Matters*, 62 Notre Dame L. Rev. 643 (1987) and Nat Stern and Kevin B. Getzendenner, *Gauging the Impact of Associated General Contractors on Antitrust Standing under Section 4 of the Clayton Act*, 20 U.C. Davis L. Rev. 159 (1986), outlining the evolution of the antitrust standing doctrine.

[17] There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

459 U.S. at 535-37 (footnotes omitted).

with a standing challenge. They are: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages. This fifth factor addresses the disfavor, expressed in *Illinois Brick*, of complex antitrust trials which not only "burden the courts, but also undermine the effectiveness of treble damages suits." *AGC*, 495 U.S. at 545, *citing Illinois Brick*, 431 U.S. at 745.

At least one commentator suggests that although deciphering a distinction between the two concepts is not obligatory, it is important to understand that even after the Court's consolidating opinion in *AGC*, antitrust injury is more than a component to be factored in a standing analysis, it must be present in every case.[18]

In a case decided shortly after the *AGC* decision, we characterized the Supreme Court's discourse:

> The Court's case-by-case approach reflects the fact that § 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and there is no talismanic test capable of resolving all § 4 standing problems.

Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 965 (3d Cir. 1983), *quoting Bravman v. Bassett Furniture Industries*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). In *Merican* we indicated (albeit with citation to a different case) that the *AGC* factors

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[18] Julian D. Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 11.04[1][c] n. 35 (1992).

should be weighed and balanced. The *AGC* opinion does not assign specific weight to its factors, individually, collectively or relatively. Nor for that matter does the decision explicitly instruct us to balance the factors, although implicit instruction is discernable from the language—"[o]ther relevant factors . . . *weigh* heavily against judicial enforcement of the Union's antitrust claim." 459 U.S. at 545 (emphasis added).[19]

The plaintiffs in *Merican* were independent distributors who purchased Caterpillar-manufactured products from its authorized dealers for resale in the foreign market. The plaintiffs alleged that by imposing a service fee on its dealers for certain transactions, Caterpillar violated the Sherman Act. The service fee was characterized as a mechanism through which Caterpillar conspired with its authorized dealers to eliminate the plaintiff's position in the market place. While recognizing that the Supreme

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[19] Some elucidation concerning the balancing of factors was provided by the Court in its decision last term in *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992). In discussing the right to sue under the treble damages provision of the Racketeer Influenced and Corrupt Organization Act (borrowed from the Clayton Act), the Court stressed that although the *AGC* case did not identify directness of relationship between plaintiff and defendant as the "sole requisite of Clayton Act causation," *id.* at 1318, directness of injury was construed as the focal point by which the remainder of the *AGC* factors are guided:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributed to the violation as distinct from other independent factors. Second, quite apart from the facts of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts to obviate the risk of multiple recoveries. And finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. (citations omitted).

Court had recently enumerated the list of factors to be utilized in analyzing standing in § 4 cases in *AGC*, we decided the case solely on the operation of the *Illinois Brick* concern, *i.e.*, that the potential for duplicative recovery and complex apportionment of damages meant that the plaintiffs were "not persons injured in their business or property by reason of violation of the antitrust laws within the meaning of seection 4." 713 F.2d at 969. *See also Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 932 (3d Cir. 1986) (under *Illinois Brick*, threat of duplicative recovery and potential for complex theory of damages bars consumer price fixing claims against automobile manufacturer).

The facts of the present case, however, require, under *AGC*, a more complete analysis, to which we now turn.[20]

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[20] Before we undertake such an analysis, the most recent Supreme Court case discussing standing must be noted. This case is *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), where antitrust claims arose out of an alleged conspiracy to inflate natural gas prices. Defendants in this action were three companies and two limited partnerships that produced natural gas. Among the plaintiffs were three investor-owned public utilities that had purchased gas directly from the pipeline in the states of Kansas and Missouri, whose attorneys general asserted claims in parens patriae capacity on behalf of its residential customers who purchased gas from the utilities.

The gas producers in defense claimed that the public utilities, despite the fact that they were direct purchasers, lacked standing because they had raised their own prices to offset the illegal charge, and thus had not suffered any damage. The district court rejected this pass-on defense and, moreover, dismissed the states as *parens patriae* on the same theory. The court of appeals affirmed.

In a 5-4 decision, the Supreme Court rejected the States' argument that indirect purchaser standing should be allowed in cases involving a regulated activity that has passed on 100 percent of an overcharge to its customers. The Court opined that the mere fact that a price rise followed an unlawful cost increase was insufficient proof of antitrust injury. The indirect purchaser, stated the Court, would have to show that the utilities had not incurred any damage from the overcharge and would have to demonstrate that the utilities would not have raised prices had there not been an increase in fuel costs. The Court then took the opportunity to caution courts not to

a. *The Steel Companies' Lake Transport Charges*

i. and ii. *Directness of Injury and Causation*

The lake transport injury asserted by the steel companies is that the payments made to the vessel companies to tranship their ore were inflated because B&LE illegally thwarted the development of self-unloaders.

To determine if lake freight savings are recoverable, our decision in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979), is helpful. In that case, like this one, damages were predicated on amounts paid to a non-conspiring party. While recognizing that a non-conspiring competitor of a defendant supplier was included under the "umbrella" of those suffering economic impact from the defendants' conspiracy, we denied standing "in light of the tenuous line of causation between the defendants' price fixing and the prices paid by [the plaintiff]." *Id.* at 583. Standing was also denied because "[t]he outcome of any attempt to ascertain what price the defendants' competitors would have

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carve out exceptions to the general rules announced in its prior standing decisions:

> The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample jurisdiction exists for our stated decision 'not to carve out exceptions to the [direct purchaser] rule for particular types of markets'. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

497 U.S. at 216, *quoting Illinois Brick*, 431 U.S. at 744.

B&LE avers that this language in *Utilicorp* prohibits us from examining the facts of this case to determine if an exception lies under *Illinois Brick*. *Utilicorp*, however, does not rule because it concerned the pass-on theory of standing and whether the regulated consumer-energy market, or any other market involving a distribution chain that resembled a series of "cost-plus" contracts, would justify an exception to the unavailability of standing on the basis of the pass-on theory. The broader concerns of *Illinois Brick* and later cases are discussed *infra*.

charged had there not been a conspiracy would at the very least be highly conjectural." *Id.* at 584.[21]

Thus, *Mid-West Paper* instructs, consistent with *AGC*, that we inquire whether the injury resulting from payment of excessive lake transport charges is directly traceable to the railroad's anti-competitive behavior. This *AGC* causation focus is not an overruling of *Illinois Brick*—an *AGC* analysis incorporates the *Illinois Brick* principles of discouraging speculative and overly complex claims. Thus, although we remain loyal to upholding the concerns voiced by the Supreme Court in *Illinois Brick*, echoed by our precedent in *Mid-West Paper* and *Merican*, the mere fact that monies paid to third parties (the vessel companies) represent a component by which the steel companies measure their damages does not foreclose further inquiry as to whether standing existed.

We agree with the district court and B&LE that the steel companies, in respect to lake transport damages, are, in some sense, "indirect" purchasers. Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claim, this conclusion is not supported by the current law. We are, instead, instructed by *AGC* to ascertain the nature of the relationship between the parties. This discretion factor thus sets the tone for our standing analysis.

The form of this conspiracy was market exclusion. B&LE concedes that an agreement existed among the

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[21] We do not, however, interpret this statement in *Mid-West Paper* or the "indirect purchaser" rule of *Illinois Brick* as announcing a strict prohibition against recovery by indirect purchasers. Despite the Court's remark in *Utilicorp* that permitting parties with indirect purchaser status to proceed with a § 4 claim would require it to "create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick* . . . ." 497 U.S. at 207, we discount the import of this language because the *Utilicorp* decision was addressing the peculiarities of applying the pass-on theory of standing in the public utility arena. *See* n.9, *supra*.

railroads to take anticompetitive action to maintain its dominance in the ore transport market. Although this aim itself is not illegal, the nefarious means to achieve it were. By charging the same rate for unloading a self-unloader as for unloading a bulker, by refusing to approve commodity line haul rates from private docks which would have handled self-unloaders, and by concertedly refusing to make dock property available for use by private docks, the railroads delayed the introduction of the more efficient self-unloader. This delay caused loss of the profits which would have been realized had the less costly transport system been in place.

The relevant question is whether B&LE's antitrust activity directly impacted the steel companies. Undeniably it did. The steel companies were the sole customers of the industry involved in the transhipment of ore; indeed, the industry existed for them. True, the steel companies made payments for ore movement services to various parties, defendants and non-defendants alike, but it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroad's agreement to thwart development of the less expensive technology.

The direct nature of the injury absorbs the question of causal connection. There are no missing links in the causation chain here. The correlation between the steel companies' inability to utilize the lower cost method to carry its ore and the railroad's attempt to close the ore transport market is obvious. The goal of the railroads in preventing the self-unloader/private dock/private trucking company system from coming into existence left four victims in its wake, the three component industries, and the steel companies. However, the steel companies suffered the greatest harm in connection with the delay of the use of the self-unloader technology. This all-important, directness factor thus weighs greatly in the steel companies' favor.

iii. *Goal of Antitrust Laws*

We ask next whether the alleged injury was the type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. *AGC*, 459 U.S. at 538, *quoting Blue Shield of Virginia*, 457 U.S. at 483. "[T]he Sherman Act was enacted to assure customers [here, the steel companies] the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. *Id.* (footnote omitted.) Thus, factor three clearly favors the steel company plaintiffs.

iv. *Other Victims*

As discussed, others suffering economic harm here included the vessel companies, the dock companies and the trucking companies. They, too, as competitors for the ore transport business, have suffered direct antitrust injury, yet the unique circumstances of this conspiracy compel us to classify their injuries as tangential to that of the steel companies. The economic health of the dock and trucking companies was, nonetheless, significantly compromised as part and parcel of the railroads' scheme to force the steel companies to remain loyal to a system where the railroads would reap the greatest profits. Therefore, other direct victims exist, but their presence does not diminish the directness of the steel companies' injury. This factor, thus, weighs evenly.

v. *Duplicative Recovery and Complex Apportionment*

The concern for duplicative recovery and the potential for complex apportionment of damages are real. Nonetheless, the involvement of other parties and their resultant damages here are not the particular kind of double recovery *Illinois Brick* sought to prevent. In *Illinois Brick* the concern was that overlapping parties would compete for the same pool of illegal profits garn-

ered from the antitrust activity. This type of duplication would be implicated here if B&LE's illegal activity were subject to suit by a "downstream" industry alleging, as was alleged in *Illinois Brick*, that the steel companies had passed on the transportation increase in the price of steel. Here, different parties allege different injuries—the steel companies' claim is for the savings which would be realized if the less expensive method of transport was in place, while the vessel and dock companies' claim focuses on lost profits.

The distinctive labelling of the claims does not solve the problem of overlap when the steel companies' claim of damages is called to proof. The steel companies would have to demonstrate meticulously that none of its lost savings includes any amounts which the vessel companies might potentially claim as lost profits.

Nevertheless, while complex apportionment problems are implicated here, we do not hold that litigation must be avoided solely because it might be difficult to ascertain damages. Injured parties cannot be penalized and left without recourse because measurement of their damages is difficult. In this vein, it is important to focus on the word "potential." We are either gifted or vexed by hindsight in this matter, but standing is a threshold determination. It decides if the plaintiffs have alleged a cause of action and have requested the recovery of damages that are cognizable under the law. The damage theories here should not be deemed complex simply because that is the way in which they were ultimately presented. Reliability is instead an evidentiary question properly decided under evidentiary standards—are the figures economically reliable? Was the expert witness credible? At the standing stage we look to the initial allegation of damages, and, at that point, the steel companies' damages did not appear incapable of accurate calculation.

The facts as found by the jury were that self-unloaders were generally less expensive to utilize. The steel com-

panies' damages were measured as the difference between the amounts they actually paid to transport their ore and the lower prices they would have paid had the conspiracy not excluded a lower cost system. Although, as in antitrust matters involving traditionally defined direct purchasers, other pricing considerations no doubt would factor, that the operating costs would be reduced overall does not require undue speculation. While we recognize that the potential for overlap existed, we are not convinced that it should prevent the matter from proceeding. Thus, although this factor weighs against the steel companies, we do not find it a reason, standing alone, sufficiently compelling to support a standing challenge. A balancing of the *AGC* factors, thus, weighs in favor of the steel companies' standing; the lake transport damages are recoverable.

b. *The Steel Companies Dock Handling Damages*

B&LE contends that the steel companies' dock damages are also barred by *Mid-West Paper*, because these damages resulted from amounts paid to non-conspiring competitors of the defendant. In *Midwest Paper* we dismissed antitrust damage claims of indirect purchasers of defendant's consumer bags under *Illinois Brick*. We held that direct purchasers from defendants' competitors lacked standing to sue on the grounds that the competitors' prices would have been lower but for the defendants' illegal price fixing. We concluded that this claim was highly speculative, and that any "attempt to determine the effect of the defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that *Illinois Brick* Court was desirous to avoid if at all possible." *Id.* at 585 (footnote omitted). B&LE characterizes the steel companies' request for dock damages as an attempt to recover the difference between the prices set and actually paid by the steel companies to the railroad docks and prices they would have paid private docks if their

services had been available. Thus, B&LE argues, the claim is dependent upon prices paid to parties other than the defendants and *Midwest Paper* bars recovery.

The defect in this argument is apparent. The steel companies directly purchased from, and paid monies to, the railroads for dock services. Thus, the amounts contested as being paid to third parties reflect only the second part of the damage equation. To refute the directness factor, the railroads break down the component costs of the dock handling charges and argues that because a portion of the charge was actually paid by the vessel companies to the railroad, here too, the steel companies are indirect purchasers.

We disagree. The dominant relationship in the context of the steel companies purchasing dock services from B&LE is one of customer-provider. The specter of indirectness does not haunt us here and a full *AGC* analysis is not mandated. The presence of the dock companies as another direct victim does not dilute the causal connection between the inflated dock handling charges paid by the steel companies and the railroads' conspiracy. The jury awarded dock damages for the steel companies' inability to utilize the private docks to handle iron ore. Thus, the damages arose from the conspiracy's effective attempt to eliminate competition from private docks, not from the charges which might have been paid to those private docks.

We have already determined that the potential for complex apportionment is not a sufficient reason to deny standing. Therefore, the *AGC* factors likewise support and uphold standing of the steel companies to claim dock handling damages.

c. *The Trucking Companies*

In Pre-Trial Order 49 filed in this matter, the district court dismissed all trucking company claims "relating to the alleged suppression of self-unloader technology, denial

of line haul rates, and suppression of (refusal to sell to) private docks." App. at 1429. Nonetheless, at the conclusion of the liability phase of the trial, the jury, in response to the special verdict questionnaire found that C. D. Ambrosia Trucking Company was injured by "acts to prevent or delay iron ore handling by private docks", App. at 1898, and that Tauro Brothers Trucking Company was injured by "foreclosure and/or delay in the utilization of self-unloader vessels" and the "inability of steel mills to fully use private docks." App. at 1899. The jury rejected other related claims of Ambrosia and Tauro. In response to the post-trial standing challenge levied against the trucking companies, in its judgment n.o.v. opinion the district court summarily stated that the rule of *Illinois Brick* did not arise in connection with the trucking companies' claims for damages.

In its main argument, B&LE does not urge that the jury instruction was faulty; rather, it argues that, under *AGC*, the trucking companies' injuries were too remote to confer standing to bring these claims.[22] B&LE also asserts, under the authority of *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), that the trucking companies' § 4 claims are barred because these companies were the benefactors of the excessive handling charges assessed by the railroads. By B&LE's logic, its refusal to provide lower line haul rates from private docks opens the door for the trucking companies to step in and offer their allegedly lower cost service.

The evidence, typified by the following excerpts from railroad communiques, shows that a primary goal of the

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[22] In its reply brief, B&LE also contends that it was unfairly prejudiced by what it refers to as the trial court's "subsequential overruling of PTO 49" in its judgment n.o.v. opinion. It does not, however, detail the form of the prejudice such as an allegation that it would have presented its evidence in a different manner or objected to testimony offered by the trucking companies regarding the fact of damage.

railroad conspiracy was to prevent or delay the trucking of ore from non-railroad facilities: "[W]e have strongly resisted for years all proposals to sell or lease Erie ore dock as a bulk materials handling facility which would be open to trucking . . ." (App. at 7952); providing line haul rates to a non-railroad dock "might influence a movement by truck" (App. at 6626); "There is one thing about rates from a private facility which has always bothered me, and that is the possibility of trucking ore and pellets to a steel plant" (App. at 7026); and, "If you lease ground to Litton, trucks could break the rail rate on iron ore—particularly on short haul moves" (App. at 7458). The actions taken by B&LE and the other railroads thus were clearly intended to inhibit the trucking companies' entry into the business of land transportation of ore. There is thus a direct relationship between the defendants' antitrust activity and the trucking companies' injuries.

This type of injury, a restraint upon market entry, is precisely the type of injury that the antitrust laws were designed to prevent. There is no question of overlap here because no other plaintiff could seek the lost profits that the trucking companies request.

While the concern for speculation regarding the measurement of damages is present, the nature of the speculation chiefly concerns when, absent the conspiracy, the steel companies would have adopted the self-unloader/private dock/trucking company system. It is the railroads who took measures to impede the development of the technology and who thus are responsible for any uncertainty concerning when market entry would have been accomplished. The *AGC* factors, thus, weigh in favor of granting the trucking companies standing to assert a claim for § 4 damages.

We, therefore, conclude that all plaintiffs, directly injured by B&LE's conspiratorial activity with the other railroads, have standing to assert § 4 claims for damages.

C. *Limitations of Actions*

B&LE claims that the federal actions filed against it are time-barred by the four-year Sherman Act statute of limitations. The Ohio actions suffer the same fate, according to B&LE, by applicaiton of the doctrine of laches. These issues present mixed questions of law and fact which implicate our plenary review of the questions of law and the clearly erroneous standard to the district court's factual findings.

1. *Federal Law*

Pointing out that the conspiracy began in the 1950's and that some plaintiffs had knowledge of the conspiracy as early as 1972, B&LE argues that those plaintiffs' claims were barred by the 4-year statute of limitations.[23] B&LE also argues that the statute of limitations permits recovery only of damages resulting from "injury-causing overt acts" that occurred within the limitations period; therefore, it would follow that the district court misapplied the statute of limitations by not requiring the jury to link damages to specific overt acts.

The Supreme Court has considered and rejected the argument that, in the context of a defendant's continuing violation of the Sherman Act, the statute of limitations runs from the violation's earliest impact on a plaintiff. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968). In *Hanover Shoe*, the defendant had initiated an illegal policy in 1912, some forty-three years before the plaintiff sued in 1955. The Court allowed damages within the limitations period, opining:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and

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[23] B&LE's argument and this discussion do not apply to the trucking company plaintiffs and Reaney, who had no knowledge of the conspiracy until events within the limitations period.

> limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . . . Although [the plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

Id. (citation omitted). To the extent that the steel companies' continued shipment of ore on Lower Lake Erie resembles the continued rents paid to the defendants in *Hanover Shoe*, the cases are indistinguishable.

The main trust of B&LE's limitations argument has not been to distinguish *Hanover Shoe*, to which it refers briefly only in its reply brief. Rather, B&LE first argues that another Supreme Court decision, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-42 (1971), applies. B&LE contends that *Zenith* generally requires proof that a newly accruing claim be based on an injurious act within the limitations period, then further argues that *Zenith* allows recovery of only those damages attributable to overt acts occurring within the limitations period. In *Zenith*, the Court articulated an exception to the general rule that a cause of action accrues each time an act causes an injury. The exception in *Zenith* was for damages that would be speculative at the time the injury-causing act was committed. *Id.*

We have held that an injurious act within the limitations period may serve as a basis for an antitrust suit. *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 & n.45 (3d Cir. 1978). In the present matter, the plaintiffs have met their burden of showing that the conspiracy continued into the limitations period. For example, rebuffed efforts to lease dock property from the railroads extended into 1978. Also in that year, the refusal to grant commodity line haul rates from non-railroad docks was still at issue. Coercion to prevent independent action continued into the limitations period. Finally, post-October 1977, dock handling rates

charged to discharge ore from self-unloaders remained artificially inflated. The existence of the continued conspiracy thus undermines B&LE's argument that damages within the limitations period were caused "solely from acts committed by the defendant outside the four-year [limitations] period."

B&LE's further argument—that *Zenith* and its progeny limit recovery to damages resulting "from injury-causing *overt* acts"—has no merit because it fails to recognize, in circumstances such as here, that continuing and accumulating damage may result from intentional, concerted inaction. The purposeful nature of the inaction—here an ongoing refusal to sell or lease—obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense.

B&LE's argument results from an overreading in which B&LE directs a myopic gaze at a general rule not at issue in *Zenith*:

> [I]n the context of a continuing conspiracy to violate the antitrust laws . . ., each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act, and . . . as to those damages, the statute of limitations runs from the commission of the act.

Zenith, 401 U.S. at 338. B&LE focuses tightly on the words "injured by an act . . . caused by that act" to propose a narrow rule that a plaintiff must tie all damages to specific overt acts within the limitations period.

B&LE's argument obfuscates the difference between, on the one hand, an "overt act" necessary to show the existence of a conspiracy, and, on the other hand, an "injurious act" causing damages within the limitations period. This argument fails to recognize that certain conspiracies, such as boycotts, operate through inaction. As the district court observed in this case, "overt acts aren't

what cause damage. It is the effectiveness of the overall conspiracy that causes damages." App. at 2376.[24]

Indeed, in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), from which B&LE quotes out of context to support its proposed "injury causing overt act" rule, the Court of Appeals for the Fifth Circuit recognized that a conspiracy's refusal to deal, which began outside the limitations period, "may be viewed as a continuing series of acts upon which successive causes of action may accrue." *Id.* at 125. Far from requiring that the plaintiff tie its damages to specific acts, the court acknowledged that a continuing conspiracy may give rise to "continually accruing rights of action," and the court simply required the plaintiff to support its allegation that the defendant had "continued during the period in suit to refuse to deal." *Id.* at 128.[25]

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[24] Although B&LE has couched its challenge in terms of the limitations period and we therefore discuss the challenge in that context, we note that, at root, B&LE is arguing about proximate cause and attempting to limit its liability by seeking to narrow the scope of causes from the conspiracy itself (within the limitations period) to particular "overt acts" (within the limitations period). This argument formulation accounts for the district court's "cause and effect" description. We are in agreement with this observation by the district court.

[25] Our decision in *Pennsylvania Dental Asso. v. Medical Service Asso.*, 815 F.2d 270 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987), upon which B&LE in part relies, is not to the contrary. *Pennsylvania Dental* was concerned with the resolutions of various dental associations not to deal with Blue Cross and with the concomitant withdrawal from Blue Cross participation by numerous dentists. Most of the resolutions and withdrawals had taken place outside the limitations periods, but as none of the resolutions had been rescinded and there was evidence of overt acts—within the limitations period—in furtherance of the conspiracy, we held that the plaintiff's claim for injunctive relief, if subject to the limitations period at all, was not time barred. *Id.* at 278. Furthermore, citing *Hanover Shoe*, we opined that "damages caused by any overt act taking place from [the beginning of the limitations period] may

Here, with respect to the statute of limitations, the district court instructed the jury during the liability phase of the trial that "the plaintiffs would have to establish that the conspiracy was still in effect after October 1977, and that at least one of the conspirators took some overt action in furtherance of the conspiracy after October 13, 1977, and that the particular plaintiff whose case you are considering was damaged after Ocotber 13, 1977." App. at 4999. While the interrogatories did not require the jury to link the overt act and injury-producing act, as a whole, the requisite findings to defeat a statute of limitations defense were present. Via separate questions, the compilation of the jury's verdict was that B&LE committed Sherman Act violations within the limitations period which caused injury to most of the plaintiffs. These responses, together with the district court's emphasis on causation in its charge to the jury, *see* App. at 4784-89, were sufficient to inform the jury that damages must have been caused within the limitations period by an active, injurious conspiracy. As the statute of limitations did not provide a basis to grant B&LE's motion for judgment n.o.v., the district court properly denied the motion.[26]

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also be recovered." *Id.* Although the clause, read narrowly, appears to support B&LE's proposed rule that damages must be tied to particular overt acts, it is clear from the context of the opinion that the conspiracy as a whole caused damages. The opinion, read in proper context, thus reiterates the rule that damages caused by injurious activity (such as a conspiracy active within the limitations period) could be recoverable.

[26] Moreover, the district court alternatively found, on sufficient evidence, that damages were not ascertainable until within the limitations period. This would suffice to bring them within the *Zenith* exception for speculative damages. *See Zenith*, 401 U.S. at 338-42. Because we have concluded that an active, injury-causing conspiracy suffices to bring the cause of action, we need not address B&LE's disputations regarding *Zenith's* exception to the rule that an action for damages occurs at the time of an injurious act.

2. *State Law—Laches*

The state antitrust claims asserted are governed by the Ohio Valentine Act. The Act expressly provides that "[n]o statute of limitations shall prevent or be a bar to any suit or proceeding for any violation of [this Act]." Ohio Rev. Code Ann. § 1331.12 (Anderson 1979 and Supp. 1990). B&LE contends that the steel companies' and Erie's Ohio Valentine Act claims are nonetheless time-barred by the doctrine of laches.

The district court rejected B&LE's laches contention for three reasons. First, the court held that laches is an equitable defense that had no application under Ohio law to actions at law for damages. Second, the district court held that the liability jury's finding that the defendant railroads took affirmative acts to conceal the conspiracy or conceal any act in furtherance of the conspiracy, precluded the application of laches. Finally, the district court found that B&LE had not demonstrated any significant prejudice attributable to the delay.

We need not determine whether the law of Ohio permits assertion of a laches defense to antitrust suits [27] or whether the fraudulent concealment claims of the steel companies and Erie should have been submitted to the

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[27] It is not clear from the caselaw that laches, an equitable defense, applies only to defenses at equity. *See Smith v. Smith*, 156 N.E.2d 113, 120 (Ohio 1954) (recognizing equitable nature of laches doctrine, but noting its applicability in certain statutory actions). *See also Thirty-Four Corp. v. Sixty-Seven Corp.*, 474 N.E.2d 295, 298 (Ohio 1984) (court referred to mortgage foreclosure action as "lawsuit" and considered whether laches applied). It is also the law in Ohio that assertion of the defense and its applicability is one which should be presented to the jury. *See, Ferree v. Sparks*, 601 N.E.2d 568, 570 (Ohio App.3d 1991) (evaluation of evidence concerning application of laches is for trier of fact). The jury's findings here concerning fraudulent concealment are not conclusive as to the steel companies, and, as to Erie, are not applicable since the jury found that the Erie plaintiffs had actual knowledge of the conspiracy prior to October 14, 1977.

jury. " 'Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.' " *Emrick v. Multicon Builders, Inc.*, 566 N.E.2d 1189, 1194 (Ohio 1991), *quoting Smith v. Smith*, 156 N.E.2d 113, 119-20 (Ohio 1954).

The district court found that B&LE had not shown any significant prejudice attributable to the delay. Unless clearly erroneous, we will not disturb that finding. B&LE contends that it was prejudiced by the death of many critical witnesses and the loss of numerous documents; B&LE, however, details neither the substance of these witnesses' testimony nor the content of lost documents and what they would have revealed concerning its defense against the conspiracy. Given the number of witnesses and documents which were admitted in evidence, it is difficult to see how B&LE was prejudiced by the lack of either of those two components of evidence. We therefore conclude that laches is not a bar to the Valentine Act claims.

Since the plaintiffs have survived the threshold challenges to the legality of the lawsuit, we now address the issues raised concerning the evidence presented at trial and the amount of damages awarded.

D. *Sufficiency of Evidence*

In support of its argument that the plaintiffs failed to prove the necessary elements to establish both the fact of antitrust injury and the amount of damages, B&LE submits three reasons for reversal: (1) that unrelated economic factors impacted upon the steel companies' decisions to delay investment in self-unloaders; (2) even if injury was demonstrated, the jury was not instructed nor could it discern from the special verdict questions that a causal connection must be established between the alleged

violations and the amount of damages awarded; and (3) the damage models upon which the awards were predicated were either speculative or unrealistic.

1. *The Liability Verdict*

While B&LE advances thought-provoking factual assertions that economic causes other than those connected to illegal antitrust activity made the use of self-unloaders financially unappealing, we are not free to revisit the factual issues other than to determine whether the evidence supports the jury's verdict.

The district court evaluated the sufficiency question as follows:

> Throughout both phases of the trial, the defendant vehemently argued, and sought to prove, that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy; that the economic studies upon which plaintiffs' damage claims were predicated were unreliable and erroneous; and that the damages claimed were either speculative, grossly exaggerated or non-existent. It is certainly true, in my view at least, that the evidence of damages did not so heavily preponderate in favor of the plaintiffs as to render the jury's verdict a foregone conclusion. The evidence as a whole did not suffice to remove all reasonable questions concerning the timing and profitability of the charges in ore transport the defendants' conspiracy allegedly delayed.
>
> But these are all factual issues and were properly submitted to the jury. Viewing the record in the light favorable to the verdict, there can be no doubt that the evidence sufficed, in all respects, to support the jury's determinations.

App. at 2129.

Relying on our similarly circumscribed review and the deference owing to the trial judge presiding over this lengthy and complex matter, we agree that the evidence sufficed to establish liability. We have discussed, in the context of other issues presented here, the persuasive evidence against B&LE documenting anticompetitive behavior violative of the antitrust laws. The presence of contrary evidence does not eradicate the probative worth of the plaintiff's case. The jury heard all the evidence and rendered a verdict, in most part, favorable to the plaintiffs. Unless the evidence is critically deficient as to the prevailing party's side so that no reasonable jury could grant it relief, we will affirm the district court's denial of the motion. *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961-62 (3d Cir. 1988).

Our review of the record more than satisfies us that the jury's verdicts for the plaintiffs were bolstered by sufficient evidence. Documents from the railroads' files establish their agreement to prevent the steel companies from utilizing the self-unloader transportation alternative. Specifically, memos and letters chronicled cancellation of railroad services from non-railroad docks, denial of competitive rates for inland rail transport from private docks, and refusal to sell or lease dock properties—all aimed toward precluding entry of the plaintiffs into the ore transport business. Also documented were the railroads' refusal to accept self-unloaders at their docks and their assessment of the same rates for bulkers and self-unloaders, regardless of the difference in services performed.

At trial, steel company officials testified concerning their interest in investing in the more cost-effective self-unloaders but that they were discouraged from doing so by the railroads' refusal to alter their rates to make the system economical. In addition, expert economic testimony offered by the plaintiffs concluded that the railroad conspiracy, delaying the utilization of the self-unloader/private dock system, caused the steel companies to pay more to transport iron ore to its facilities.

Accordingly, as to the claim of insufficiency of the evidence, the district court did not err in refusing to grant B&LE's motion for judgment n.o.v.

2. *The Antitrust Claims of the Erie Plaintiffs*

B&LE contends that the Erie plaintiffs' damages, traceable to an alleged refusal by Penn Central to sell dock property to Erie, were caused by Erie's own financial disability and not by railroad misconduct. Once again, this is a point argued during trial which the jury heard and disregarded.

We have reviewed the record and find that the quantum of evidence needed to uphold this award is present. A former member of the Erie Port Commission testified that the sale of the dock property was unacceptable to it because it included a restriction on the handling of iron ore. When Penn Central offered to remove the restrictions in exchange for an approximately 40 percent increase in the selling price, the Commission deemed the sale uneconomical. In contrast, the documentary evidence which B&LE asserted demonstrated that the sale failed because of a funding shortfall was, at best, equivocal. The damages award granted on this basis will not be disturbed.

3. *The Jury Instructions and Special Verdict Questions*

B&LE asserts that only a retrial can cure the prejudicial windfall to the plaintiffs resulting from the district court's failure to provide the jury with proper guidance. According to B&LE, the jury was never told to limit the plaintiffs' monetary recovery to amounts directly related to the defendants' illegal activity.

B&LE is correct when it asserts that one pursuing antitrust recovery must establish that the damages suffered were caused by the defendant's participation in a scheme repugnant to the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Once causation is determined, however, the actual amount of

damages may result from a "reasonable estimate, as long as the jury verdict is not the product of speculation or guess work." *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983), *citing J. Truett Payne, Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969). The Supreme Court, in its decisions of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) and *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 55 (1931), did not impose stringent proof requirements regarding the damages alleged in the injury-causing acts. It was emphasized, however, in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946), that antitrust recovery can constitute compensation for only those damages directly caused by unlawful competition. The relaxed measure of proof is afforded to the amount, not the causation of loss—the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven. *MCI Communications*, 708 F.2d at 1081.

We overturned a jury verdict when review of the evidence showed that a damage award was partially based on legally-permitted competition by the defendant, *Coleman Motor Co. v. Chrysler Motors Corp.*, 525 F.2d 1338 (3d Cir. 1975), but similar considerations are not operable here. The damages awarded here were not attributable, in any extent, to lawful railroad activity. Rather, B&LE asserts that outside economic factors, totally unrelated to its industry, made investment in self-unloader technology unattractive. And, forming the focus of B&LE's challenge, the jury instruction and special interrogatories were inadequate to convey to the jury the importance of the link of causation to damages.[28]

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[28] B&LE contends that the district court erred as a matter of law in not instructing the jury on the fact and import of market power. The primary ground for this assertion is that the plaintiffs claimed

To the contrary, the instruction to the damages jury explained the proper focus of the jury's deliberation—how damages were to be calculated, how to evaluate the evidence and the ways in which the parties disagreed on the method of calculation of damages.

> What is required, and the burden is upon the plaintiff, is to provide you with a reasonable estimate of their damages, what your regard as a reasonably reliable estimate. You are not permitted to simply guess or speculate or pull figures out of the air. You have to have a rationale, reasonable basis for supporting the damages' figure that you come up with is a reasonable estimate, a fair estimate of the probable loss sustained by the plaintiffs. To the extent that you find that any money was lost because of general conditions in the steel industry not attributable to this conspiracy and so forth, you should, of course, not include any such sums in your calculation of damages . . . there should not be any overlapping or duplication of damages.

App. at 6377.

The jurors could deduce from the charge that they were to divorce from their deliberations any non-conspiratorial activity. Because the language conveyed this clearly, the challenge to the instruction fails.

Concerning the specificity of the interrogatories, we must determine whether the district court abused its discretion

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and recovered damages for ore moved outside the lower Lake Erie region, on Lake Michigan and Lake Detroit.

We note that B&LE stipulated to the tonnages of ore involved in the conspiracy. During the damages charge, the district court informed the jury that "everyone agrees on the total amount of pelletized ore that was transported during the relevant time." App. at 6338. Because B&LE agreed to the specific tonnages involved in the conspiracy, it cannot now come forward and dispute the amount as improperly including tonnages which were moved beyond the geographic range of the conspiracy.

in their formulation. *McNally v. National Ins. Co.*, 815 F.2d 254 (3d Cir. 1987). The interrogatories are adequate if they will determine the facts essential to the judgment. *Kornicki v. Calmar S.S. Corp.*, 460 F.2d 1134, 1139 (3d Cir. 1972).

Our review shows that the questions sent to the jury here met that criteria. There was no abuse of discretion calling for a new trial.

4. *The Damage Models*

B&LE next points to the models designed by the plaintiffs to assess damage and characterizes them as overspeculative and in conflict with the economic realities of the time. As with its sufficiency of evidence causation claim, B&LE was given the opportunity to confront the plaintiff's evidence, aggressively seized upon the opportunity to do so and presented its own version of the extent of damages to the jury.

Our review of the record convinces us that the jury's verdict in the plaintiffs' favor is fully supported. The district court did not err in refusing to award a new trial on the damages issue.

E. *Post-Judgment Interest*

The last issue we address on B&LE's appeal is the date from which post-judgment interest should be calculated. 28 U.S.C. § 1961, the governing statute, reads in relevant part:

> § 1961. Interest
>
> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of judgment . . . .

With the statute in mind, we examine, under plenary review, the order of events here.

On April 19, 1989, the district court, in Pre-Trial Order No. 49, determined that "all claims against the defendant Penn Central Corporation are dismissed." App. at 1430. On July 18, 1989, the damages jury returned its verdict against B&LE in favor of the plaintiffs. On July 20, 1989, the court ordered judgment on the jury's verdict.

On August 2, 1989, B&LE moved for judgment n.o.v. and on February 27, 1991, the district court issued its opinion and orders on post-trial motions.

On March 5, 1991, B&LE filed a supplemental motion to correct the final judgment to substitute July 19, 1989 for July 18, 1989 as the date of final judgment and the date from which interest accrues. The court responded to the motion and amended its order to reflect that interest on the judgment runs from July 19, rather than July 18, 1989.

On March 28, 1991, B&LE filed its notices of appeal. Amended notices of appeal were filed on March 29, 1991. Then, on June 17, 1991, the district court re-entered judgment in favor of the appellees/cross-appellants against B&LE in accordance with its order on post-trial motions. At this time, the court also entered judgment in favor of the defendant Penn Central Corporation.

In response, on July 15, 1991, B&LE filed a supplemental motion to amend the judgment, contending that post-judgment interest should not run from July 19, 1989 as previously requested but rather from June 17, 1991, when the trial court for the first time entered the final judgment in this complex matter—the order in favor of Penn Central against plaintiffs. App. at 2205.

We conclude that July 19, 1989—the date upon which judgment was entered in favor of the plaintiffs and against B&LE—is the appropriate date from which post-judgment interest should run. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827 (1990), the Supreme

Court identified the purpose of post-judgment interest as the successful plaintiff's compensation for the loss between determination of damages and payment by the defendant. *Id.* at 835-36; 28 U.S.C. § 1961. The statute does not, by its terms, mandate that the judgment from which interest is calculated must be a final judgment. Our view is consistent with the statute's philosophy of providing compensation from a point at which the loss-causing defendant's liability is entered on record.

Here, judgment against the loss-causing defendant, B&LE, was entered on July 19, 1989. The subsequent "housekeeping" entry, dismissing finally the *plaintiffs'* claims against Penn Central, was completely divorced from a determination of the prevailing plaintiffs' loss. While concerns of finality and appealability might be implicated by the eventual entry of judgment against Penn Central, the statute's purpose in awarding post-judgment interest was satisfied when judgment was entered against B&LE in July of 1989.

We turn now to the issues raised in the cross-appeals.

III. *The Cross-Appeals*

A. *Fraudulent Concealment—The Steel Companies*

To surmount the four year statute of limitations hurdle which would preclude recovery for pre-October 1977 damages, the steel companies claimed that the statute was tolled because the railroads fraudulently concealed the conspiracy.

In Pretrial Order 49, the district court granted summary judgment for B&LE on the steel companies' fraudulent concealment assertion. The court ruled:

> [T]he steel company plaintiffs are precluded from recovering damages sustained more than four years before the respective complaints in this action were filed. Not only did they plainly have knowledge of

> facts which should have reasonably made them aware of a basis for asserting the very claims now being asserted, but it is also clear that they were specifically being urged to support an antitrust suit by Pinney Dock—at least as early as 1972, and more than four years before the criminal indictment.

App. at 1427-28.

At a subsequent pretrial argument, the steel companies challenged the entry of summary judgment referring, as one basis, to the statement of the court regarding Pinney's request to the steel companies to support Pinney's antitrust cause of action. The steel companies disputed first, that Pinney was soliciting support for an antitrust lawsuit and, second, that each steel company was an individual recipient of Pinney's petition for participation. The court replied:

> Well there was a slight misunderstatement [sic] I agree. They were asked to support an application to the ICC. And certainly from the standpoint of Pinney it was also Pinney's knowledge that it was considering an antitrust action, and this would be the first step before it.
>
> I agree there is nothing in some instances at least to suggest that they were requested to support an antitrust action.
>
> *The important thing is, however, that they were certainly aware of what the railroads' policies had been.*

App. at 2321 (*emphasis added*). The court did not substantively respond to the challenge to the lack of evidence that some steel companies (National, Republic and Sharon), were even approached by Pinney.

On review, we apply the same test that district courts employ in summary judgment matters. The facts must be viewed favorably to the non-movant, B&LE. If there is no disputed question of material fact, and B&LE is en-

titled to judgment as a matter of law, then summary judgment will be affirmed.

The steel companies contend that because twenty-eight of its officials testified at trial that they had neither knowledge nor suspicion of the conspiracy, the question of fraudulent concealment was not factually foreclosed and should have been submitted to the jury.

We have not specifically elucidated the standards for pleading fraudulent concealment in the antitrust context. However, in a case decided under Pennsylvania law, *Bohos v. Beloff*, 950 F.2d 919 (3d Cir. 1991), we identified the three factors necessary to forestall the running of the limitations statute by way of a fraudulent concealment allegation: (1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiffs' inquiry, who (3) exercised due diligence in investigating his cause of action. *Id.* at 925-26.

The Court of Appeals for the Sixth Circuit directly addressed the issue of the tolling of antitrust claims by fraudulent concealment in *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975). Holding that the exercise of due diligence is required in antitrust cases to employ the fraudulent concealment doctrine to avoid bar of the statute of limitations, the court referred to the requirement for the defense set out by the Supreme Court many years ago in *Wood v. Carpenter*, 101 U.S. 135 (1879):

> Any fact that should excite his suspicion is the same as actual knowledge of his entire claim. Indeed, the means of knowledge are the same thing in effect as knowledge itself. 101 U.S. at 143. If the plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery and the delay which has occurred and must be shown to be consistent with requisite diligence.

Id. at 394.

The Sixth Circuit revisited the issue of fraudulent concealment in the *Pinney Dock* case. There, the court rejected the defense because the antitrust causes of action "were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding such a concealment and well within the appropriate time for commencing such actions." 838 F.2d at 1483.

Given our precedent in *Bohos,* we agree with the Court of Appeals for the Sixth Circuit that the exercise of due diligence must be shown in the antitrust context. The steel companies, who have the burden of proof, *see Pinney Dock,* 838 F.2d at 1465 (plaintiff has burden of proving fraudulent concealment elements), have identified areas of factual dispute concerning their ignorance of the railroads' sub rosa rate-setting activity and anti-competitive non-rate actions. But these assertions did not include evidence of due diligence. Given the scope of the steel companies' knowledge of publicized railroad rate-making decisions—the same rates charged for handling self unloaders as bulkers and the refusal to grant commodity line haul rates from private docks—we find that the steel companies have failed to satisfy the diligence component of the defense. What the steel companies *did* know about the railroads' rate-making should reasonably have made them aware of a basis for asserting the very claims now being raised. The district court properly granted summary judgment for B&LE on this issue.

B. *Waiver—National Steel*

Like the other steel company plaintiffs, National Steel sought recovery under federal and state antitrust laws for damages resulting from B&LE's participation in the conspiracy to delay the introduction of the self-unloader/private dock system. Setting National Steel apart from the other steel company plaintiffs is the fact that National Steel owned and operated its own fleet of vessels for the transportation of iron ore. National Steel's esablished proprietary interest in vessels, in particular the self-unloader,

the *Stinson*, gave rise to National Steel's additional claim for damages—that, absent the conspiracy, National Steel would have built the *Stinson* earlier and at a lower cost.

The liability jury found that the conspiracy caused injury to National Steel resulting from "foreclosure and or delay in the utilization of self-unloading vessels for the delivery of iron ore" and "the ability to fully use private docks to handle iron ore." App. at 1894. At the damages phase of the trial, National Steel's expert witness testified that National Steel would have purchased the *Stinson* in 1972 instead of 1974, which would have resulted in a significant cost savings.

B&LE moved for a directed verdict at the conclusion of the damages phase of the trial, alleging that National Steel failed to present evidence from which the jury could reasonably calculate damages, that its evidence rested on false assumptions and ignored significant contributing factors to its alleged injuries, and that B&LE's expert damages witnesses demonstrated the inadequacy and unreasonableness of National Steel's allegation. App. at 2037-38. The district court denied B&LE's motion.

The damages jury determined that the cost savings to which National Steel was entitled amounted to $16,700,000, portions of which were trebled under federal law and doubled under Ohio state law, for a total award of $39,700,000.

In its judgment n.o.v. opinion, the district court determined that B&LE had properly preserved the issue concerning the amounts awarded to National and concluded that the jury's cost savings verdict was impermissible, reasoning that the cost savings damages reflected only the impact of inflation, an aspect of monetary damage not recoverable under the relevant antitrust laws. Granting B&LE's motion for judgment n.o.v., the court elaborated its rationale:

> National did eventually invest in self-unloader vessels. It claimed that the vessels cost more to build than would have been the case if they had been constructed earlier. The inescapable conclusion, however, is that the difference in costs reflects merely the impact of inflation, presumably offset by the time value of money, and not an actual loss to the plaintiff.

App. at 2108-09.

National Steel cross-appealed on two grounds. First, National Steel claims that by asserting only a general objection to the evidence of damages in its directed verdict motion, B&LE waived its right to argue that the award of cost savings damages was not cognizable under the antitrust laws. Second, even if the argument was properly preserved, National Steel argues that the additional amount paid for the *Stinson* was legally recoverable as actual damages resulting from B&LE's conduct and that the jury's verdict was rationally based on the expert testimony presented by National Steel.

We need not decide the merits issue because we conclude that B&LE has not preserved its argument in accordance with our decision in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984). In *Bonjorno*, the district court granted judgment n.o.v. in an antitrust action concluding that damages for diminution of "going concern" value were not recoverable. We reversed because the defendant only challenged damages generally and failed to raise that specific reason in its motion for a directed verdict. 752 F.2d at 814-15. We explained that the "specific grounds for a JNOV must be asserted in the motion for a directed verdict," 752 F.2d at 814, *citing Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, 467 U.S. 1242 (1984), and the lack of specificity on a particular issue will defeat a motion for judgment n.o.v. on that ground. *Id.* This requirement affords the non-moving party a chance to

respond with additional evidence, and avoids infringement of the non-moving party's Seventh Amendment rights. *Id., citing Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976).

While B&LE contends that its directed verdict motion explicitly contested the inclusion of inflation as a component of damages, B&LE additionally argues that, by the content of the trial, National Steel was put on notice that there was a challenge to National Steel's recovery for cost savings resulting from the delayed construction of the *Stinson*.

We disagree with B&LE's assertions. First, the portion of the directed verdict mounting a challenge to the damages claims of all plaintiffs did not confront National Steel's cost savings damages claim with the required specificity such as would have alerted National Steel that B&LE was contesting damages attributed solely to inflation. National Steel argued that such notice would have prompted it to develop an alternative theory of recovery, and to introduce evidence that the timing of the construction of the self-unloader exposed National Steel to increased competition in the building of these vessels, and hence diminished its profit. We believe that the lack of opportunity to present additional evidence, followed by a grant of judgment n.o.v., is tantamount to the trial court deciding an issue already submitted to and deliberated on by the jury which compromises the non-moving parties' right to a fair trial. *Bonjorno*, 752 F.2d at 814.

Second, we do not credit B&LE's assertion that, during the course of the trial, it was challenging National Steel's recovery as representing only inflation. We have reviewed the record references and do not find that the evidence cited would have put National Steel on guard that its proof of damages was inadequate. By our reading, the questioning at trial concerned whether National Steel's expert computed a deduction for the use of equity; that

is, because National Steel did not invest in the self-unloader, it had additional cash to invest elsewhere. This other investment and its return, argued B&LE, should have been deducted from the figure representing the amount suffered because National Steel did not buy the self-unloading vessel earlier. This challenge to the evidence is not specific as to how inflation factored into the calculations nor does it even mention inflation as a disputed element.

We conclude that B&LE failed to preserve, in its motion for a directed verdict, the ground upon which the district court relied to grant judgment n.o.v. in B&LE's favor. The district court was, thus, without authority to decide the merits of the issue and the judgment abrogating the award of damages to National Steel will be reversed.

C. *Prejudgment Interest—The Steel and Dock Companies*

Under Ohio law, the prevailing party may recover prejudgment interest if the losing party failed to make a good-faith effort to settle the case. Ohio Rev. Code Ann. § 1343.03(C) (Anderson 1979 and Supp. 1990). This includes consideration of whether a party rationally evaluated its risks and potential liability and whether a good faith monetary settlement offer or response to an offer by the other party occurred. *Kalain v. Smith*, 495 N.E.2d 572, 574 (Ohio 1986). If a party has a good faith, objectively reasonable belief that liability does not exist, the party does not need to offer a cash settlement in order to avoid prejudgment interest liability in the event it does not prevail. *Id.*

The district court refused to award prejudgment interest on the plaintiffs' Ohio Valentine Act judgments because it found that B&LE's refusal to settle the case was based on the reasonable belief that it was without liability to the plaintiffs.

The plaintiffs contend that B&LE's plea of *nolo contendere* in its criminal prosecution and the substantial settlements by co-conspirators evidence B&LE's lack of a good faith, objectively reasonable belief that it was not liable. In light of this, B&LE's repeated refusals to engage in settlement negotiations were in bad faith and thus subject B&LE to liability for prejudgment interest. The plaintiffs refer to several settlement overtures which they offered both pre-trial and after the liability verdict which B&LE declined to pursue. Although B&LE did make a settlement proposal during the second day of the damages trial deliberations, plaintiffs classified the offer as grossly inadequate because it was far exceeded by the then current toll of attorney's fees.

We review the district court's decision whether to grant prejudgment interest for abuse of discretion. Given the difficulty in resolving many of the legal issues presented here, we agree with the district court that B&LE had a reasonable expectation that it would not be liable to the plaintiffs. We thus conclude that the district court did not abuse its discretion in failing to award prejudgment interest under Ohio law.[29]

D. *The Seventh Amendment Right to a Fair Trial—The Wills Affiliates*

Despite a finding of antitrust liability in favor of the Wills affiliates, the damages jury awarded them only nominal damages. Wills asserts that this award results from the trial court's failure to confine the second trial to a calculation of the amount of damage sustained. Instead, complains Wills, B&LE was permitted to retry its liability defense. Because causation elements re-entered the damage phase of the trial, Wills contends that its

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[29] B&LE also doubts that an award of prejudgment interest is permissible for damages awarded under Ohio's Valentine Act. Since we are denying the cross-appeal on other grounds, we need not reach this issue.

Seventh Amendment right to a fair trial was violated. We exercise plenary review when constitutional questions are presented on appeal.

Seventh Amendment problems are inherent when separate juries determine fact of damage and amount of damages. According to the Supreme Court, bifurcated trials are permitted only if the separate issues are so distinct that a trial of one without the other may be had without injustice. *Gasoline Products Co. v. Champlain Refining Co.*, 283 U.S. 494, 500 (1931). If "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, [this] would amount to a denial of a fair trial." *Id.*

Although we have not, in a majority opinion, discussed the Seventh Amendment dilemma posed by bifurcation of an antitrust case, the constitutional concerns have been recognized by our colleagues. *See Bonjorno v. Kaiser Aluminum*, 752 F.2d at 816 ("[B]ifurcation of trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products* . . . .") (*Statement of Adams, J., sur denial of the petition for rehearing en banc.*) Also, in *Link v. Mercedes-Benz*, 550 F.2d at 875, the dissenting judge rendered this prescient opinion:

> Admittedly, in an action under § 4 the task of defining which issues are so separate and distinct as to satisfy the test of *Gasoline Products* is complex. Since liability under § 4 necessarily includes proof of injury to business and property, bifurcation to separate juries of liability and damages in a § 4 case inevitability introduces the possibility that in the liability phase the first jury might find that there was such injury, while the second jury might on the

> same evidence of injury in the damage phase, find none.

Id. (Gibbons, J., dissenting).

This articulated possibility became reality here. During the liability phase of the trial, Wills presented evidence to show that its attempts to purchase dock facilities to accommodate self-unloading vessels were continually thwarted by the railroad conspiracy. To demonstrate injury to its business, Wills contended that had it been able to acquire the necessary dock space, its companies would have handled the iron ore unloading and land transport needs of Armco Steel. This loss of Armco's business was the sole evidence of property injury to Wills. Thus, Wills' claims were tied to its ability to serve a specific customer and it was required to show, during the liability phase, that Armco would have used its dock and truck service. This basis of liability was vigorously challenged by B&LE who attempted to show that Armco would not have utilized Wills' services to the extent alleged, if at all.

The liability jury was instructed that to find for all plaintiffs here they must determine that:

> [T]he particular plaintiff . . . was genuinely interested in doing it, it requested the transaction, and was financially able to carry it out . . . . You can't claim to have been damaged unless you were genuinely damaged, and you can't be genuinely damaged unless if the [private docks][30] had been willing and

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[30] We have signified a change from the text which requires some explanation. In the transcript, the word "railroads" appeared where we have bracketed "private docks." We altered the quote because it is obvious from the full context, that the reference was to the dock companies and not the defendant. We are confident, too, that, in hearing the instruction as a whole, the jury understood the court to be discussing the burden of the dock companies.

> would have been in a position and would have carried through with the project.

App. at 4998.

After hearing the evidence and the instruction, the liability jury answered "yes" to the following questions concerning B&LE's antitrust liability to Wills:

> Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills' Dock Company (Toledo World Terminals, Inc. and its predecessors, Consolidated Dock, Inc. and Consolidated Dock & Storage, Inc.)?
>
> [D]id the injury result from:
>
> * * *
>
> [a]cts in furtherance of the conspiracy, including the refusal to sell or lease dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio?
>
> Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills Trucking, Inc. because it was unable to provide a trucking service in combination with Wills' dock service?

App. at 1900.

Since the jury found that Wills had suffered damage to its property by the conspiracy, in order not to violate the Seventh Amendment, the role of the second jury should have been limited to determining the amount of damages Wills incurred from acts taken in furtherance of the conspiracy. Nonetheless the Seventh Amendment prohibition against reexamination of the issue of fact of damage was compromised soon after the damages jury was empaneled. Upon seating the jury, the district court informed it that "the defendant will be entitled to defense on the ground that these damages have not been established *or that any damages that they might have suffered*

stem from causes other than the antitrust conspiracy claim." App. at 5113-14 (emphasis added). This comment, although not starkly objectionable, set the tone for the overlap of causation questions which the damages jury was permitted to hear.

During the course of the damages trial, Wills offered evidence necessary to calculate damages under a lost profits theory. B&LE's key defense witness on damages was Dr. H. W. Pifer, who was also B&LE's primary witness during the liability phase. At the damages trial, Dr. Pifer began to discuss documents relevant to events dated in the mid-1950's, before any plaintiff's damage period began. The court denied an objection to the entry of this evidence. Dr. Pifer then cited to exhibits indicative of potential causes for the plaintiff's damage other than the antitrust conspiracy. At this point the plaintiffs were granted a continuing objection to the use of testimony and documents relevant to causation and fact of damage issues. When the objection was raised, the court responded, "I am not so sure it is limited to impact. Objection overruled. It conceivably might have something to do with the amount." App. at 6041.

After further testimony by Dr. Pifer, the plaintiffs moved for a mistrial or, in the alternative, to strike the testimony of Dr. Pifer because of its direct contradiction to what the prior jury had held. The court, in overruling the objection and denying the mistrial, stated that he would "straighten it out in the charge of the court." App. at 6078.

However, as the following excerpts reveal, the subsequent charge to the jury could not be construed as curative:

> In an antitrust conspiracy case, the law is that each member of the conspiracy is equally responsible for all the damages caused by the entire conspiracy. So that it is not necessary for the plaintiffs to have shown that the Bessemer & Lake Erie Railroad

> Company in and of itself caused each and every element of damage that is claimed. *All that they had to show was that they were injured as a result of the antitrust conspiracy of which it has been established that the Bessemer & Lake Erie Railroad Company was an active participant.*

App. 6355 (emphasis added). And later,

> Now, with respect to the claims of the dock company plaintiffs, the issue is relatively straightforward at least in theory. *If they were deprived of the chance to handle iron ore at their private docks,* they were deprived of the chance to get into the private dock business for handling iron ore, the question is: When would they have gotten into that business? How much tonnage would they have handled? And what would have been their profit on the tonnage they would have handled?

App. at 6367. Finally, as to nominal damages:

> Now, I mentioned in passing, but I will recapitulate, that the burden of proof is on the plaintiffs in any case which the plaintiffs are seeking to recover damages. But once the plaintiffs have established that they did suffer an injury, it is not encumbent upon the plaintiffs to show their damages with mathematical certainty.
>
> In any case such as this where you are trying to reconstruct what would have happened in the absence of a conspiracy, it is obviously beyond human possibility to know for certain exactly what would have happened. What we are trying to do here is reconstruct in our minds a hypothetical world which would have existed in the absence of this suppression of competition.
>
> In that situation the law says the plaintiff who has shown injury is not to be faulted because of the in-

> ability to prove damages with mathematical precision or with any very great degree of certainty.
>
> What is required, and the burden is upon the plaintiffs, is to provide you with a reasonable estimate of their damages, what you regard as a reasonably reliable estimate. . . . [I]f you conclude that the plaintiffs have not established a reasonably sound basis on which you can make a rational estimate that is satisfactory to you, you would have the right to say they haven't proven their damages. In that case you would award only nominal damages, a dollar.

App. at 6375-77.

The instructions given concerning the function of the jury at this juncture were confusing. Taken as a whole, and in combination with the court's opening statement and the liability-type evidence which was introduced during the damage phase, the jury could have easily understood that they were to consider causation. Of particular concern is the court's statement that "all that they had to show was that they were injured as a result of the antitrust conspiracy." Although the past tense utilized might indicate that the court was describing the necessary proof in the first trial, since that was not spelled out, the opposite interpretation is just as easily understood—that the plaintiffs were *now* required to show injury resulting from the antitrust conspiracy. We point also to the language of the court when it explained to the jury how it should determine dock company damages. The district court stated that *if* the plaintiffs were deprived of the chance to handle iron ore at their private docks, then the jury should proceed to answer further questions. Once again, causation considerations were put before the jury.[31]

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[31] The district court's clouding of the fact and the amount of damages is exemplified in a portion of its judgment n.o.v. opinion

Finally, the award of nominal damages to Wills can only be understood if the jury considered causation. The sole injury alleged by Wills was its inability to acquire a private dock and to truck ore for Armco Steel. For the liability jury to return a verdict in its favor can only mean that Wills proved that it was injured, to *some* extent, by the preclusion from handling Armco's business. The first jury heard both the plaintiffs' case and the defense's evidence concerning the prospects of Wills to serve Armco's transport needs and found in favor of Wills. It impliedly found that, by virtue of the conspiracy, Wills was precluded from making profits by handling at least some of Armco Steel's iron ore. Nominal damages are appropriate only when plaintiffs are unable to prove any amount of damages and are not properly awarded when a plaintiff, like Wills, has established a quantifiable loss of revenue. While Wills' calculations as to the quantity of ore it would have handled and the amount of potential profit were certainly challengable in the damage phase, an award of nominal damages was simply inappropriate.

We note a similarity to our decision in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). In *Rea*, an antitrust defendant argued that the trial court erred when at a retrial for damages it refused to allow one defendant to introduce evidence that its acts were not the cause of the plaintiff's injury. We rejected the defendant's contention that these elements of causation were really damages issues. "Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage." *Id.* at 577.

The admonition of *Rea* against retrial of causation issues in a damages trial was violated here. Even B&LE

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where it observed: "Throughout *both phases of the trial, the defendant vehemently argued, and sought to prove, that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy . . . .*" App. at 2129 (emphasis added).

does not dispute that it put before the jury facts tending to disprove that its conspiratorial actions were the cause of Wills' injury. This is a clear violation of the Seventh Amendment.

We therefore reverse the order of the district court denying Wills' Seventh Amendment claim and order a retrial of Wills' damage phase case. Because we are reversing on legal grounds, we need not address the other issue raised by Wills that a new trial is mandated by allegedly objectionable remarks concerning causation presented by defense counsel to the jury during the damages trial.

IV.

At the outset of this opinion, we stated our substantial affirmation of the order of the district court. We conclude here with grateful acknowledgment of the district court's careful analysis and profound scholarship in shepherding the parties and issues through the complexities of the lawsuit.

We will, therefore, affirm all but two aspects of the order of the district court. We will reverse the grant of judgment n.o.v. against National Steel and remand for entry of judgment in its favor. We will also reverse the denial of the Wills' post-trial motions and remand for a new trial limited to a calculation of damages.

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed May 27, 1993, be amended as follows:

On page 25, the second full paragraph, delete the first three sentences of the paragraph and substitute the following language:

> While the Court of Appeals for the Second Circuit affirmed the district court's principal ruling. *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1349 (2d Cir. 1985), it noted a possible distinction between rate-making activity, shielded by *Keogh*, and other, unprotected, concerted activity. The *Square D* shippers had . . . .

On page 48, the first full paragraph, add footnote number 22 after the sentence reading "The steel companies would have to demonstrate meticulously that none of its lost savings includes any amounts which the vessel companies might potentially claim as lost profits." The language for the footnote is as follows:

> 22. An illustration of why the steel companies' damages would not necessarily duplicate the damages of the vessel and docking companies can be made by hypothesizing that the steel companies paid $10 in transport and docking charges for a ton of ore under the old system; with self-unloading bulkers they would pay $7 for transport and docking the same amount of ore. The steel company damages would then be $3, the difference between $10 and $7. The vessel and docking companies' lost profits

would, however, have been incorporated in the $7 and thus would not be duplicative.

All subsequent footnotes should be renumbered to reflect the addition of this footnote.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Master File No. MDL 587

IN RE LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

OPINION AND ORDERS ON POST-TRIAL MOTIONS

FULLAM, J. FEBRUARY 7, 1991

This multidistrict litigation, in which ten antitrust suits were consolidated in this court for pretrial proceedings, and retained for trial, involves a conspiracy dating from the mid-1950's on the part of a group of defendant railroads (the Penn Central Corporation (Penn Central), the Chesapeake & Ohio Railway Company (C&O), the Baltimore & Ohio Railroad Company (B&O), CSX Corporation (CSX), the Bessemer & Lake Erie Railroad Company (B&LE), the Pittsburgh & Lake Erie Railroad Company (P&LE), Consolidated Rail Corporation (Conrail), the Norfolk & Western Railway Company (N&W), and Norfolk Southern Corporation (Norfolk Southern) to monopolize the dock handling, storage and land transportation of iron ore along lower Lake Erie. The claims against all defendants except the B&LE were settled or dismissed before or during trial.

The liability phase of the trial commenced on May 9, 1989. The jury returned a verdict on June 19, 1989 in favor of plaintiffs in *Wills Trucking, Inc., et al. v. Chesapeake & Ohio Railway Co., et al.*, Civil Action No. 84-2010 (*Wills*), *C.D. Ambrosia Trucking Co. v. Chesapeake & Ohio Railway Co., et al.*, Civil Action No. 84-2012 (*Ambrosia*), *Republic Steel Corp. v. Penn Central Corp.*, Civil Action No. 84-2079 (*Republic*), *National Steel v. C&O Ry.*, Civil Action No. 84-2134 (*National*), *Jones & Laughlin Steel Inc. v. Penn Central Corp., et al.*, Civil Action No. 84-2135 (*J&L*), *Wheeling-Pittsburgh Steel Corp. v. Penn Central Corp., et al.*, Civil Action No. 84-2138 (*Wheeling-Pitt*), *Tauro Bros. Trucking Co. v. Baltimore & Ohio Railroad Co., et al.*, Civil Action No. 84-2781 (*Tauro*), *Sharon Steel Corp. v. Penn Central Corp., et al.*, Civil Action No. 84-5562 (*Sharon*), and *Erie-Western Pennsylvania Port Authority, et al. v. Chesapeake & Ohio Railway Corp., et al.*, Civil Action No. 84-5760 (*Erie*), and in favor of defendant B&LE in *David W. Reaney, et al. v. Chesapeake & Ohio Railway Co., et al.*, Civil Action No. 84-2722 (*Reaney*). The damages trial before a different jury began on June 26, 1989, and culminated on July 18, 1989 in verdicts totalling $243.5 million in actual damages. With appropriate trebling under federal law and doubling under state law, the total verdicts amount to $638.5 million.

I. BACKGROUND

Much of the iron ore processed into steel by the plaintiff steel companies originates in mines located in Michigan, Minnesota and eastern Canada. Iron ore is shipped across the Great Lakes and unloaded at docks along lower Lake Erie in Pennsylvania and Ohio. Many of these docks were owned by the railroads, and were the primary handlers of ore. For many years, the prevailing method of unloading bulk commodities such as iron ore was by means of huletts, which are large cranes affixed

to the docks. The huletts lifted bulk commodities such as ore from the ships, known as "bulkers": the cargo was then either loaded into railroad cars for immediate transport, or transferred into storage. During the period of the conspiracy, rates for these services at all of the railroad docks were identical. The private (i.e. non-railroad) docks in the vicinity were not equipped with hulettes, and thus could not compete for iron ore traffic.

In the 1950's some iron ore producers began to "pelletize" their ore, making possible its transportation via self-unloading vessels. These vessels, as the name implies, were capable of unloading themselves by means of a conveyor belt. With the advent of larger self-unloaders in the 1960's, these ships could carry twice the load carried by the conventional bulkers and could unload themselves more quickly and without special equipment. The railroads, unwilling to lose the profitable iron ore trade and fearful of losing their substantial capital investments in huletts, decided to halt the progress of self-unloader technology, in part by keeping dock-handling rates for self-unloaders artificially high: the railroads charged the steel companies the same dock handling rates for self-unloaders as for bulkers.

Another aspect of the conspiracy involved line haul rates, which are the rates charged by the railroads for transporting ore and other commodities from specific docks to the steel companies' mills. Pursuant to ICC requirements, the rates from the railroad docks to all steel mill customers were identical, irrespective of the distances involved. The plaintiff private docks were effectively precluded from handling ore from the self-unloaders by the railroads' refusal to publish competitive commodity line haul rates from these private docks to the steel mills; and the plaintiff trucking companies (which, not surprisingly, had no access to railroad docks) were therefore unable to compete with the railroads for land

transportation. Moreover, the railroads either refused outright to sell or lease to private concerns any property that could be used as an ore dock, or would only sell or lease the property subject to restrictions against such use.

In the liability phase of the trial, the jury found that the B&LE participated in this conspiracy in violation of sections 1 and 2 of the Sherman Act and of Ohio's antitrust law, the Valentine Act, and that at least one overt act in furtherance of the conspiracy occurred after October 13, 1977. This jury further found: (1) that the conspiracy injured the plaintiff steel companies by foreclosing and/or delaying the utilization of self-unloaders and by rendering them unable to use private docks; (2) that the conspiracy injured the *Erie* plaintiffs by preventing them from subleasing or purchasing Penn Central's ore dock at Erie, Pennsylvania or from having competitive iron ore rates at that dock; (3) that the conspiracy injured Ambrosia by delaying iron ore handling by private docks, which would permit the trucking of the ore; (4) that the conspiracy injured Tauro by foreclosing and/or delaying the utilization of self-unloaders at docks to which trucks would be allowed access, and by preventing steel mills from fully using docks; and (5) that the *Wills* plaintiffs were injured by, among other things, the railroads' refusal to lease or sell dock properties without restrictions, preventing Wills from engaging in an iron ore business at Toledo, Ohio and from providing a trucking service in combination with its dock services. Finally, the jury found that the railroads took affirmative steps to conceal the conspiracy.

II. SUMMARY OF LEGAL ISSUES

The legal and factual issues involved in this litigation are numerous and complex. They involve such matters as whether defendant's activities were exempt from antitrust scrutiny at the time they occurred; whether plaintiffs have "antitrust standing" to assert their various dam-

age claims; whether some or all of plaintiff's claims are barred as indirect, under the doctrine of *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977); whether plaintiffs can maintain antitrust claims under Ohio's Valentine Act; whether some or all of plaintiffs' claims, under federal law or state law, are time-barred, and, of course, whether various aspects of the juries' verdicts are adequately supported by the evidence.

Many of the legal issues were addressed pre-trial at various stages, *see, e.g.,* Pretrial Orders Nos. 4, 11, and 49, but must be re-visited in light of the more complete factual development at trial.

It is a fair generalization to state that, throughout the trial, doubtful issues were resolved in favor of submitting claims and defenses to the jury for specific factual findings. Thus, as to any issue where the correctness of this court's pretrial rulings was fairly debatable, the parties were permitted to develop the factual record. This approach has had two notable impacts upon my assessment of post-trial briefing: a particular award is not automatically invalid merely because it is arguably inconsistent with some aspect of a pretrial ruling—the goal is to achieve the correct disposition of the issue. Conversely, aspects of the jury verdicts should not automatically be regarded as unassailable because the issue was submitted to the jury and there is evidence to support it—again, the ultimate question is whether the correct result has been reached.

III. IMMUNITY

Railroad rates and charges which are subject to the jurisdiction of the Interstate Commerce Commission are conclusively presumed to be reasonable, hence the defendant cannot be held liable for damages under the antitrust laws because a plaintiff has been required to pay such rates or charges. *Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156 (1922), and *see Square*

D Company v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

Moreover, the process by which ICC-approved tariffs become effective necessarily involves a great deal of concerted action among competing railroads. Congress has therefore specifically exempted from antitrust scrutiny all railroad actions taken pursuant to the specified procedures. Section 5(a) of the Interstate Commerce Act, as amended by the Reed-Bullwinkle Act of 1948, 49 U.S.C. § 1070(a). Pursuant to that statute, the ICC approved the Agreement of Eastern Railroads which established the rate bureau (the Coal, Coke and Iron Ore Committee), of which the defendant was a member. Eastern Railroads—Agreement, 277 ICC 279 (1950). All claims based upon railroad action taken pursuant to that agreement are barred by the § 5(a) immunity.

Although competing railroads are permitted to agree on rates, charges, divisions and the like, pursuant to the rate-bureau mechanism, and to agree upon proposed tariffs to be filed with the ICC, each railroad must remain free to propose its own tariffs, independently of the group tariff; agreements among railroads which purport to curtail such freedom of independent action—*e.g.*, threatened coercive action if a different individual tariff is proposed—can give rise to antitrust liability. And, of course, combinations and agreements on matters other than tariff proposals, taken outside the Rate-Bureau mechanism, can also give rise to antitrust liability.

These issues were fully explained to the respective juries, and there is no present contention that either charge was erroneous. The liability jury found that the defendant had, indeed, violated the antitrust laws by conduct which was not immune from antitrust scrutiny, and the damages jury found that plaintiffs' damages were attributable to non-immune conduct. Contrary to defendant's present argument, these findings are amply supported by the evidence.

Literally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy, dating back to at least 1950, to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold in the transportation of ex-lake iron ore. The record is so clear and complete, in fact, that it can be read to suggest that the participants may have genuinely believed that the antitrust laws did not apply to railroads at all. In part because of this phenomenon, over plaintiffs' objection at trial, I submitted to the jury the issue of whether the defendant may have been acting in the good-faith belief that it was merely carrying out policies approved or encouraged by the ICC. The jury rejected this "regulatory climate" contention, however, hence that issue need not be considered further.

IV. STANDING/INDIRECT-PURCHASER CONTENTIONS

It is a principal contention of the defendant that plaintiffs' damage claims are precluded by the indirect-purchaser doctrine announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as interpreted in *Midwest Corp. Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). In *Illinois Brick*, a price-fixing case, it was held that only the initial purchaser who paid the inflated price could maintain an action under the antitrust laws for treble damages. Although subsequent purchasers no doubt paid an inflated price also, the court held that their damages were too indirect; that to permit indirect purchasers to sue under the antitrust laws would expose the defendant to unlimited potential liability; and that problems of proof would render it unduly difficult to prevent duplicative recoveries. In *Midwest Paper*, the Third Circuit Court of Appeals applied that doctrine to rule that only purchasers from a price-fixing conspirator could sue under the antitrust laws; purchasers

from non-conspiring competitors of the conspirators could not recover, even though the price-fixing conspiracy may well have enabled the non-conspiring competitor to charge a higher price than would otherwise have obtained.

Applying these principles to the present factual situation is not an easy task, at least as to some of the plaintiffs' claims.

The ultimate verdict in this case awards the various steel companies damages in one or more of the following categories: inflated dock-handling charges they were required to pay; damages they suffered because of inflated cost of lake transport of iron ore, because of suppression of self-unloader technology; additional "demurrage" costs incurred (as to plaintiff Wheeling-Pitt only); and additional "investment costs" because of delay in acquiring self-unloading vessels (as to plaintiff National Steel only).

The Erie plaintiffs were awarded damages for lost profits resulting from having been excluded from establishing a private dock. And the trucking-company plaintiffs were awarded damages in the form of profits allegedly lost because of their exclusion from the iron-ore hauling business.

No serious *Illinois Brick* issues arise with respect to the steel companies' material-handling awards, nor with respect to the claims of the Erie plaintiffs or the trucking company plaintiffs, but the claims of the steel company plaintiffs for damages associated with the delay in introduction of self-unloader technology (apart from the extra dock-handling expenses) present some very close questions.

Plaintiffs' claims are based on the contention that, by refusing to provide a line-haul rate from private docks which could handle self-unloaders, and by insisting upon charging the same price for unloading a self-unloader as for unloading a bulker which required the use of huletts, and by concertedly refusing to make lake-front property

available for use by private docks, the defendants delayed the introduction of the more efficient self-unloaders in the transport of iron ore across the Great Lakes.

It was not until the Poe Lock was enlarged so as to accommodate 1,000-foot vessels that the use of self-unloaders became advantageous for handling iron ore. A substantial portion of the capacity of a self-unloader vessel is occupied by the self-unloading mechanisms; vessels less than 1,000 feet in length could not also hold a sufficient quantity of iron ore pellets to justify the substantial additional expense associated with construction of such vessels. But once it became feasible to use 1,000-foot vessels, the self-unloaders did have the potential for large savings, not only in dock-handling expense (if private docks could have been used), but also in operating expenses.

With respect to the inflated dock-handling charges, the plaintiff steel companies were customers of the railroads —direct purchasers within the meaning of *Illinois Brick*. With respect to the amounts claimed because the steel companies paid more for the lake transport of ore than they allegedly would have absent the conspiracy, the analysis is less clear. The shipping concerns which transported iron ore across the lakes in "bulker" vessels charged more for that service than would have been necessary if self-unloaders had been in use. But under the doctrine of *Illinois Brick*, it would seem that the shipping companies, rather than these plaintiffs, are the only firms entitled to assert such claims. Plaintiffs contend, however, that, but for the conspiracy, plaintiffs themselves would have acquired self-unloading vessels, and would have benefitted directly from the reduced costs of operating such vessels. On that theory, the conspiracy can be said to have constituted a boycott, or exclusion-from-the-market, rather than a price-fixing arrangement. Thus, whether the steel companies' claims for "self-unloader" damages—by far the largest portion

of their awards—can be sustained depends upon whether the evidence shows that they had both the ability and the intention to enter the lake-transport market at the relevant times.

There is ample evidence that the steel companies would have sought the lowest-cost method of transporting iron ore from its source to their mills, and would have utilized self-unloaders had they been available. And, if the jury accepted the testimony of plaintiffs' witnesses, the jury could well have found that the plaintiff steel companies would have purchased or leased their own self-unloader vessels. *See, e.g.*, testimony concerning National's acquisition of the vessel *Stinson*, and the testimony of Mr. Dragoneer (liability N.T. 772) and Mr. Stuthers (liability N.T. 838-44).

The facts of this case do not fit comfortably on either side of the line between permissibility and impermissibility established by *Illinois Brick*, *Midwest Paper*, and *Pennsylvania Dental Ass'n v. Medical Services Ass'n*, 815 F.2d 270 (3d Cir.), *cert. denied*, 108 S.Ct. 153 (1987). Plaintiffs were purchasers of lake transportation services. As a direct result of defendants' conspiracy, they were required to pay excessive dock charges—excessive because the railroads charged more at their own docks than they should have, and because the railroads impeded the establishment and development of competing private docks. As a result of the unavailability of lower dock charges, there was no ecnomic incentive to develop 1,000-foot self-unloaders, so that trans-lake transportation cost more. From the perspective of *Illinois Brick*, it can be said that the conspiracy increased the costs of the shipping companies; plaintiffs, as indirect purchasers, cannot recover from defendant the additional costs paid to the shipping companies—the providers of lake transportation are the only acceptable plaintiffs. From the perspective of *Midwest Paper*, plaintiffs purchased transportation services from non-conspirators, and cannot claim to have

been overcharged for trans-lake transportation by the defendants.

On the other hand, the *Pennsylvania Dental Ass'n* case makes clear that, in some circumstances, more than one class of plaintiffs has antitrust standing and can be permitted to recover damages, so long as there is no duplication of recoveries, and no insoluble apportionment problems arise. Here, plaintiffs argue, their damages are distinct from damages which might be recovered by vessel companies (plaintiffs were denied cost-savings, vessel companies may have lost business).

Although the question is a close one, I believe the critical factor here is the steel companies' history of direct involvement in ownership and control of ore vessels. Although direct, outright, ownership may have been relatively rare, it is reasonably clear that, through long-term leases or other contractual arrangements, the steel company plaintiffs did in fact assume responsibility for financing and operating ore-carrying vessels. It was reasonable for the jury to conclude that, but for the conspiracy, plaintiffs would have been similarly involved with self-unloaders, and would have achieved direct cost-reductions. The case more nearly resembles market-exclusion than a pure price-fixing situation. Accordingly, although with less than complete confidence, I conclude that the lake transportation savings awards should not be disturbed.

V. "INVESTMENT-COST DAMAGES"—NATIONAL STEEL

The jury awarded plaintiff National Steel $10.4 million under the Valentine Act, and $6.3 million under the federal statute, claimed by National as additional "investment costs" it had sustained by reason of the conspiracy. Although supported by expert testimony, these awards are, I believe, impermissible. National did eventually invest in self-unloader vessels. It claimed that the vessels cost more to build than would have been the case if they

had been constructed earlier. The inescapable conclusion, however, is that the difference in costs reflects merely the impact of inflation, presumably offset by the time-value of money, and not an actual loss to the plaintiff. As to these claims, defendants' motion for judgment n.o.v. will be granted. Contrary to plaintiff's assertion, defendant adequately preserved this issue in its motion for a directed verdict.

VI. DEMURRAGE—WHEELING-PITTSBURGH

Plaintiff Wheeling-Pitt claims to have experienced increased demurrage expenses as a result of the conspiracy. The jury awarded damages of $1.3 million under the Valentine Act and $1 million under the federal statute for those claimed losses. Plaintiff clearly established that its demurrage expenses have sharply declined with the advent of self-unloader-private dock transportation of pelletized ore. Defendant argues that other steel company plaintiffs concluded that their demurrage charges either were not affected, or were decreased, during the period of the conspiracy, and, therefore, Wheeling-Pitt's contrary experience must be attributable to causes other than the conspiracy.

I am not prepared to rule, as a matter of law, that all steel companies must claim and prove the same kinds of damages, or that all were required to conduct their operations in the same manner. Defendant's argument concerning causation was forcefully presented to the jury. Viewed in the light most favorable to the plaintiff, the evidence supports the jury's factual finding. The jury's verdict cannot be disturbed.

VII. LIMITATIONS/LACHES ISSUES

The parties agree that all federal antitrust claims arising before October 14, 1977 are time-barred, but dispute the impact of that cutoff date upon the correct measurement of plaintiffs' damages.

A. *FEDERAL CLAIMS*

Defendant B&LE, relying on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), argues vigorously that the statute of limitations for federal antitrust actions, 15 U.S.C. § 15b, bars the recovery of damages sustained within the limitations period but caused by pre-limitations period acts. In *Zenith*, the Supreme Court cited the general rule concerning when damages are recoverable under the federal antitrust laws:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. Moreover, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after the trial.

Id. at 338-39 (citations omitted). The Court went on to delineate an exception to this general rule:

> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date

> they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

Id. at 339.

Zenith had been injured by defendant's participation in certain patent pools. Although Zenith limited its damage claims to those damages incurred during the limitations period (1959-1963), defendant claimed that at least some of those damages were caused by pre-1959 conduct and were time-barred. The Court applied its "speculative damages" exception and reasoned:

> We find it difficult to believe that Zenith could have convinced a District Court sitting in 1954 that, although it contemplated a free market from that time forward, it would still be suffering from provable injury more than five years later. It is true that the damages awarded Zenith in this case were based on estimates of its volume of business in a free market. But those estimates were for a past period of times the size and conditions in the market were known and the competitive forces were identifiable. Zenith's performance during the same period and under comparable conditions was a matter of record. It is quite another matter to predict market conditions and the performance of one competitor in that market five to 10 years hence.

Id. at 341-42.

Despite defendant's urging, I believe that neither *Zenith* nor its progeny announced a hard-and-fast rule that each item of damages must be traced to a specific overt act within the limitations period, especially where, as here, plaintiffs' injuries are due to the operation of a continuing conspiracy with continuing effects. As the Supreme Court stated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968):

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm. . . .

Id. at 502 n.15 (citations omitted). It cannot fairly be said that plaintiffs' damages resulted solely from pre-limitations period acts; furthermore, it would be extremely difficult, if not impossible, to determine which particular act caused which discrete amount of damage. I am not inclined to place this burden upon plaintiffs, nor do I believe that the remedial purposes of the statute would be served by such a construction.

Nevertheless, even if *Zenith* does stand for the proposition that all damages must be traceable to an overt act occurring within the limitations period, application of *Zenith*'s "speculative damages" exception would be appropriate. The B&LE argues that plaintiffs' damages do not fall within the *Zenith* exception for two reasons: (1) estoppel due to my dismissal of the pre-October 29, 1978 claims against the Penn Central, which involved a determination that claims were "ascertainable" prior to the consummation of the bankruptcy; and (2) the damages were not so speculative as to bar a cause of action before the limitations period. I note, however, that plaintiffs' claims against the B&LE were not at issue in *In re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir.), *cert. denied sub nom. Pinney Dock & Transport Co. v. Penn Central Corp.*, 474 U.S. 1033 (1985), and furthermore that "ascertainability" for bankruptcy purposes is not a synonym for "recoverability" under the antitrust laws.

The Third Circuit Court of Appeals has applied the *Zenith* exception to permit the recovery of damages caused (at least in part) by pre-limitations period acts. In *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127,

138-39 (3d Cir. 1978), plaintiff was permitted to recover damages that it could not have estimated earlier. The court held that even if the district court had been correct in finding that plaintiff, who was forced to relocate his grocery store, had been injured in 1971, his 1974 suit was not time barred. Citing *Landon v. Twentieth-Century Fox Film Corp.*, 384 F. Supp. 450, 458 (S.D.N.Y. 1974) ("The fact that the parties to [copyright assignment] agreements are able to place some ascertainable present value on an expectancy interest in the renewal copyright to come into being twenty-eight years later is strong evidence that future damages flowing from an illegal tying arrangement involving the renewal rights can be calculated with reasonable certainty at the time of the original assignment."), the court concluded:

> [T]he type of guidelines present in *Landon* did not exist in 1971 for estimating Friedman's damages. Friedman seeks to recoup lost profits that resulted from its relocation—damages that could not be anticipated in 1971.

Harold Friedman, 587 F.2d at 139. The court explicitly adopted the Fifth Circuit's rule, announced in *Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977), that damages resulting from anticompetitive conduct within the limitations period, but authorized by a contract entered into before the limitations period had begun to run, are recoverable.[1]

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[1] The Fifth Circuit added two caveats, which the Third Circuit cited in a footnote. First, the action must be brought within four years of the injurious act if "the violation is final at its impact," such as "where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts." *Imperial Point*, 549 F.2d at 1035 (quoting *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 126-27 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976)). Second, "a cause of action will not lie for

In *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania*, 815 F.2d 270, 272 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987), Blue Shield alleged that organized dentists committed an antitrust violation by convincing Pennsylvania dentists to refuse to contract with Blue Shield. Many of the group's resolutions had been adopted prior to the limitations period, and many dentists' withdrawals from participation in Blue Shield's plan took place before that time. Citing *Zenith*, the court reversed the district court's grant of summary judgment in favor of the dentists and stated that Blue Shield's cause of action arose only when it suffered injury. The Court held that the action was not time-barred, noting that there was sufficient evidence for a trier of fact to find that there was a continuing conspiracy, given that Blue Shield was still continuing to feel the effects of the conspiracy and because of evidence of overt acts occurring within the limitations period. This holding implies that the *Zenith* exception applies to a continuing conspiracy with lingering effects, especially where overt acts take place within the limitations period. Such is the case here.

Furthermore, plaintiffs could not have calculated their damages with any degree of certainty until those damages had actually been suffered. Plaintiffs were purchasers, and as such could not have quantified "overcharges" until they were overcharged:

> Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. . . . Not until the monopolist actually sets an inflated price and its customers determine the

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damages that occur within the four years preceding suit, if those damages result *solely* from acts committed by the defendant outside the four-year period." *Id.* at 1037 (emphasis added). I note that neither caveat applies here. This is not a case in which defendant's violation was a final act nor can it be said that plaintiffs' damages arose solely from pre-limitations period acts.

> amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered". . . .

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 295 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).[2]

Finally, I note that given that the jury's finding of fraudulent concealment of the railroads' unlawful conspiracy, it would be inequitable to permit the B&LE to defeat the purpose of the antitrust laws by invoking the statute of limitations. Plaintiffs may recover all of their limitations period damages under the federal antitrust laws.

B. *STATE-LAW CLAIMS*

An Ohio statute, commonly referred to as the Valentine Act, Ohio Revised Code § 133 *et seq.*, proscribes anti-competitive conduct occurring within the State of Ohio, to the same effect as the Sherman Act. The statute expressly authorizes private suits by persons suffering injury as a result of violations of the statute and permits recovery of double damages. Ohio Revised Code § 1331.08. The statute further provides, in § 1331.12:

> "No statute of limitations shall prevent or be a bar to any suit or proceeding for any violations of §§ 1331.01 to 1331.14, inclusive . . . ."

Thus, on its face, the statute plainly precludes the defense that any of palintiffs' claims under the Valentine Act are time-barred. Plaintiffs have nevertheless not sought, in this action, to recover damages over the entire period of the alleged conspiracy; primarily as a matter of practical convenience, their claims under the Valentine Act have been limited to the period commencing January 1, 1968.

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[2] Indeed, had plaintiffs brought suit earlier defendant certainly would have argued that their future damages were unduly speculative.

Defendant now argues, alternatively, that the Valentine Act is entirely preempted by the Sherman Act; that, at the very least, its "no limitations" feature is preempted by the Sherman Act; that the federal statute of limitations should be applied by analogy; and that, under a proper interpretation of Ohio law, Valentine Act claims are indeed governed by the general Ohio limitations statute, which provides a four-year limitations period, not tolled by fraudulent concealment. In essence, defendant argues that the "no limitations" provision in the Valentine Act does not mean what it says and, in any event, should not be applied in this case.

In my view, proper interpretation of the statute begins and ends with its plain language. This is a lawsuit brought pursuant to § 1331.08 and the "no limitations" provision in § 1331.12 applies to *"any suit* or proceeding for *any violations* of § 1331.01 to 1331.14, *inclusive.*

It may well be, as defendant has so laboriously attempted to show, that the original impetus for the "no limitations" provision was the recommendation of the Attorney General of Ohio, in 1910, that more time was needed for investigations leading to *quo warranto* or injunctive proceedings instituted by the Attorney General. But the statue was enacted by the Legislature, not the Attorney General; and the Legislature may well have concluded that anti-trust enforcement would be enhanced by extending the time for private enforcement actions as well. Given the plain language of the statute, it would be an exercise in judicial usurpation of the legislative prerogative for this court to accept defendant's policy and legislative-history arguments.

Defendant's preemption arguments are equally unavailing. In *California v. ARC America Corp.*, 109 S.Ct. 1661 (1989), the Court identified four instances in which federal preemption of state antitrust laws occurs: (1) when Congress has explicitly so stated; (2) when Congress intended to fully occupy a given field; (3) when

compliance with both federal and state law is impossible; and (4) when the state law would obstruct the accomplishment and execution of the full purposes and objectives of Congress.

Applying these criteria, there can be no preemption in this case. Congress has not provided for preemption, nor has it occupied the entire field of antitrust law. As the Court stated in *ARC America, supra*, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies" (*id.* at p. 1665). There can be no contention that compliance with both the Valentine Act and the federal antitrust laws is impossible, or that the statute as a whole, or its "no limitations" provision, in any way impedes fulfillment of a congressional objective.

In *Pinney Dock & Transportation Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 109 S.Ct. 196 (1988), the Sixth Circuit Court of Appeals reversed a district court ruling that the Clayton Act's limitations period preempted the Valentine Act's no-limitations provision. 838 F.2d at 1481. Finally, in *ARC America, supra*, the Supreme Court noted that there is a "presumption against finding preemption of state law" in the antitrust field, 109 S.Ct. at 1665, and that the fact that a state law may provide for liability "over and above that authorized by federal law" is not a sufficient basis for preemption, *id.* at 1667.

I conclude, therefore, that plaintiffs' Valentine Act claims are not time-barred, and that neither the statute itself, nor its no-limitations provisions, are preempted by federal law.

c. *Laches*

Rulings which were made before and during trial left open the possibility that, notwithstanding the "no-limitations" provision of the Valentine Act, some of plaintiffs, claims might be barred by laches. Also left unresolved

was the related issue of whether laches was a matter for the jury, or for the court; that is, it was understood that, by submitting to the jury factual issues which might bear upon the laches defense, I had not finally ruled on the applicability of that defense, or its amenability to decision by judge or jury.

I now conclude that laches does not bar any of the claims asserted in this litigation. In the first place, laches is an equitable defense, and has no application to actions at law for damages. *See, e.g., Smith v. Smith,* 156 N.E. 2d 113, 119 (Ohio 1959); *Wright v. Oliver,* 517 N.E. 2d 883, 885 (Ohio 1988). *See also Telectronics Proprietary, Ltd. v. Medtronic, Inc.,* 687 F.Supp. 832 (S.D.N.Y. 1988) (laches inapplicable to antitrust damage actions because only applicable to equitable claims).

Moreover, and perhaps of greater importance the jury's factual findings rule out a laches defense. In answer to interrogatory No. 17, the liability jury found that the defendants acted affirmatively to conceal their conspiratorial activities; and in answer to interrogatory No. 18, found that, until October 14, 1977, none of the plaintiffs whose claims we are now considering had actual knowledge of the unlawful conspiracy, or knowledge of facts "which, through the exercise of due diligence, should have caused them to discover the unlawful conspiracy".

These findings are binding and conclusive, if *laches* is an issue to be resolved by the jury. And, even if *laches* is a matter for the court to decide, these findings have an advisory effect which there is no reason to disregard. Moreover, in these circumstances, a judge should tailor factual findings to those rendered by the jury.

A further possible issue which has not been argued, except perhaps by implication, should also be addressed. Notwithstanding the absence of a limitations defense under Ohio law, it can be argued that a defendant's due-

process rights might be violated by imposing liability to private litigants for damages occasioned by ancient wrongs. That is, there may be situations in which a fair hearing, in the constitutional sense, has been rendered impossible by the passage of time. Assuming there is some such due-process limit to the enforcement of the "no limitations" provision in the Valentine Act, I am satisfied that the circumstances of the present case do not give rise to any legitimate due-process concerns. Because of the nature of the business enterprises involved, the relevant events are well documented. Defendant has shown no significant prejudice attributable to delay.

For all of these reasons, I conclude that plaintiff's Valentine Act claims are not barred by *laches* or any other legal or equitable doctrine.

VIII. TOLEDO WORLD TERMINAL, INC'S MOTION FOR JUDGMENT NOV OR A NEW TRIAL

The jury which tried the liability issues in this case found that the antitrust conspiracy, in which defendant Bessemer & Lake Erie (B&LE) was a participant, was a material cause of injury to the business of Toledo World Terminal, Inc. (Toledo); and that this injury resulted from

> "acts in furtherance of the conspiracy, including the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent [the owners of Toledo] from engaging in an iron ore business at Toledo, Ohio."

The jury which tried the damage issues was specifically instructed that

> "in each case, it has been established that the particular plaintiffs but for this conspiracy would have been interested in and would have gotten into the business of handling pelletized iron ore." (Tr. 2124.)
>
> . . .

> "The quesiton is, when would they have gotten into that business? How much tonnage would they have handled? And what would have been their profit on tonnage that they would have handled?" (Tr. 2134.")

Finally, the damage jury was instructed at length about the burden of proof, and that if, after carefully considering all of the evidence, they were of the view that the evidence did not measure up to that standard—*i.e.*, that it did not enable the jury to find that it was more likely than not that the plaintiffs had suffered damage in an amount which was reasonably ascertainable—they should award nominal damages. In the case of Toledo, the jury did award nominal damages, and Toledo now seeks judgment NOV in its favor.

According to plaintiff, the "uncontroverted evidence" leads inevitably to "one and only one conclusion", namely, that Toledo's actual damages were $4,246,000, which should be trebled to $12,738,000. Plaintiff's evidence, if accepted by the jury, would undoubtedly have produced a verdict in that amount. But plaintiff is inconsistent in characterizing that evidence as "uncontroverted"; although defendant did not produce expert testimony of its own on the issues relating to Toledo, plaintiff's evidence was severely undermined through cross-examination, and to some extent by contemporaneous documents.

Plaintiff's theory was that, in the absence of the antitrust conspiracy, plaintiff would have handled all of the pelletized iron ore of Armco Steel. The parties had stipulated to the total tonnage of pelletized iron ore shipped to Armco during the relevant period and plaintiff's expert testified to the amount of profit which Toledo would have netted by handling that tonnage.

But the expert's opinion, or assumption, that Toledo would have handled all of Armco's ore was patently far-

fetched; there was documentary evidence from which the jury could have determined that the owners of what later became Toledo had never expressed any interest in establishing a dock to handle iron ore until 1979 (rather than the starting date assumed by their expert, 1973). Moreover, the persuasive force of Toledo's expert testimony was substantially neutralized by the expert's failure to consider whether, in the absence of the antitrust conspiracy, Toledo would have encountered competition from other docks—which might have at least shared in some of Armco's tonnage. Finally, the assumptions on which the expert calculated Toledo's hypothetical profits were subject to serious and legitimate challenge.

In short, the jury's rejection of plaintiff's damage evidence is not at all surprising; the verdict for nominal damages finds ample support in the record. Toledo's motion for judgment N.O.V. must be denied.

Toledo's alternative motion for a new trial fares no better. As noted above, it is my view that the jury's verdict was not against the weight of the evidence; and it was not contrary to the court's charge.

The liability jury had determined only that plaintiff was adversely affected by the antitrust conspiracy by being precluded from the dock business at Toledo. Obviously, it made no findings concerning the amount of plaintiff's losses, nor the duration of the period in which damages were sustained. It was therefore not misconduct for defense counsel to argue to the jury that contemporaneous documents established Toledo's lack of interest in handling iron ore in 1973 or for several years thereafter.

I also reject the contention that defense counsel in closing misled the jury by arguing that Armco's own business decisions during the relevant period showed that plaintiff would not likely have been handling pelletized

iron ore for Armco; and by pointing out that accepting plaintiff's damage calculations would mean that Armco would have been damaged by the antitrust conspiracy to the tune of $36 million or more, yet Armco had not sued the defendant. The first part of this argument was entirely justified by the evidence, and was not misleading. Arguably, the statement that Armco had not brought suit, although true, went beyond the evidence. But plaintiff failed to preserve the error, if any, by an objection. New trials are not justified by belated seeking out of such minutiae; plaintiff is grasping at straws.

Finally, the argument that "the court erred in not ruling on plaintiff's motions requesting that the B&LE not be permitted to retry impact" is a puzzling one. Plaintiff did indeed file a motion in limine to preclude defendant from retrying issues already determined by the liability jury. Although no formal ruling on the record disposes of that motion, it is my recollection that, in discussions with counsel, it was agreed that plaintiff's position was correct, but that it could only be vindicated by evidentiary rulings in the course of the damage trial. More important, plaintiff does not, even now, contend that any of defendant's evidence was erroneously admitted—merely that defense counsel's closing argument improperly addressed issues of "impact" as well as the amount of damages. But (1) plaintiff failed to object at any time, and (2) it was entirely proper for defense counsel to argue that plaintiff's damage evidence should be rejected because, among other things, it overstated the duration of the alleged impact.

Plaintiff's alternative motion for a new trial will be denied.

IX. PRE-JUDGMENT INTEREST

The juries' awards of damages under the federal antitrust laws are subject to trebling; it is clear that, in these circumstances, plaintiffs are not entitled to the addition

of pre-judgment interest. But the plaintiffs who have been awarded damages under state law—the Ohio Valentine Act—contend that, under the law of Ohio, they are entitled to pre-judgment interest on the Valentine Act awards.

Section 1343.03(c) of the Ohio Revised Code, effective July 5, 1982, provides:

> "C. Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determined at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good-faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good-faith effort to settle the case.

Ohio courts have held, however, that a party has not "failed to make a good-faith effort to settle" under that statute if the party has adequately cooperated in discovery proceedings, rationally evaluated risks and potential liabilities, and not interposed any unnecessary delay of the proceedings and has acted in good faith in settlement negotiations. *Kalian v. Smith*, 25 Ohio St. 3rd 157, 495 N.E. 2d 572 (1986). The court specifically stated, however:

> "If a party has a good-faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

In the present case, it is true that the defendant B&LE made no settlement offers until after the liability verdict, and that the offer it made before the damage verdict was far less than either side had already expended in attorney's fees. Plaintiffs argue that the defendant could not have entertained a good-faith belief that its offers would

be accepted, and that the defendant's settlement posture throughout the litigation does not measure up to the good-faith standard imposed by the Ohio statute. In the circumstances of this litigation, the defendant could well have entertained a good-faith and not unreasonable belief that it had no liability to the plaintiffs. Although the evidence of the overall conspiracy among the defendant railroads was compelling, most of that evidence related to the prelimitations period, and very little of it related to the defendant B&LE. There was a legitimate argument that, regardless of the improprieties which may have been committed by the other defendants, the B&LE was not guilty of anti-competitive conduct. There was also a legitimate contention that B&LE's participation in any alleged conspiracy had entirely ended before October 1, 1977. And it cannot reasonably be suggested that the defendant's appellate arsenal will be devoid of legitimate argument.

I recognize that, given the liability findings, I urged the parties to re-evaluate their settlement positions and come to a reasonable settlement of the case. At that point, all of the larger and most culpable defendants had settled, and it seemed appropriate to emphasize the practical implications of the fact that all of the plaintiffs' damages evidence would be focused upon the one remaining defendant. But I do not believe that the Ohio statute, properly interpreted and applied, requires a defendant to make a substantial offer to settle claims on which the defendant, not unreasonably, expects to prevail.

The motions for addition of pre-judgment interest will be denied.

X. TREBLING OF NOMINAL DAMAGES

Several of the plaintiffs who were awarded only nominal damages as to some of their claims have filed motions to amend the judgment by trebling these nominal damage awards. I conclude, however, that trebling is

appropriate only with respect to compensatory damages awarded by the jury—*i.e.*, where the burden of proof of actual damages has been met. The award of nominal damages signifies merely a decision by the jury that, as to the plaintiffs and categories in question, the evidence did not prove any actual damages. The nominal damage awards will not be trebled.

XI. "OPPORTUNITY COST" DAMAGES

The Erie, Ambrosia, and Tauro plaintiffs sought to recover, in addition to claimed lost profits, damages which they described as "opportunity costs" damages. Their economic experts testified, as I understand their testimony, that the defendant's conspiracy, caused them to lose, not only the profits they would have earned handling or hauling pelletized iron ore, but also the additional economic benefits they could have reaped by investing those profits over the years. The jury rejected those additional claims, and those plaintiffs now seek judgment n.o.v. or a new trial on that issue.

Notwithstanding the terminology employed by the witnesses in describing these claims, I was not persuaded at trial, and I remain unpersuaded, of any meaningful distinction between such claims and a claim for pre-judgment interest. Although I agreed to submit the issues to the jury, primarily as a precautionary measure, I advised counsel at the time that, in my opinion, no such award could be permitted to stand. The jury verdict has now provided a further obstacle to such an award, and I see no basis for rejecting that determination.

XII. SUFFICIENCY OF THE EVIDENCE OF DAMAGES

The defendant earnestly contends that the evidence does not suffice to impose any liability upon the defendant, and that, in any event, there is inadequate evidentiary support for the jury's damage awards. I have discussed above

my view that the evidence overwhelmingly established culpable, non-exempt, conduct on the part of the conspirators, and was adequate to prove the defendant B&LE's culpable involvement in, and non-withdrawal from, the conspiracy. Throughout both phases of the trial, the defendant vehemently argued, and sought to prove, that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy; that the economic studies upon which plaintiffs' damage claims were determined were irregular and erroneous; and that the damages claimed were either speculative, grossly exaggerated or non-existent. It is certainly true, in my view at least, that the evidence of damages did not so heavily preponderate in favor of the plaintiffs as to render the jury's verdict a foregone conclusion. The evidence as a whole did not suffice to remove all reasonable questions concerning the timing and profitability of the changes in ore-transport the defendant's conspiracy allegedly delayed.

But these are all factual issues and were properly submitted to the jury. Viewing the record in the light favorable to the verdict, there can be no doubt that the evidence sufficed, in all respects, to support the jury's determinations.

XIII. TRIAL ERRORS

Defendant's post-trial efforts have been devoted almost exclusively to obtaining judgment n.o.v. Of the many hundreds of pages of briefs submitted on behalf of the defendant, less than two pages deal with grounds for a new trial, in notably non-specific terms.

Assuming the defendant has not abandoned its quest for the alternative relief of a new trial, I am nevertheless not persuaded that there are valid grounds for that relief. So far as I am aware, no evidence was erroneously excluded or admitted, and the instructions to the jury were reasonably adequate and correct. If any errors did occur,

I am satisfied they would have had no significant impact upon the outcome. Defendant's motion for a new trial will be denied.

XIV. RAINEY PLAINTIFFS' MOTION FOR JUDGMENT NOV OR A NEW TRIAL

The liability jury returned a verdict in favor of the defendant B&LE and against the Rainey plaintiffs, finding that these plaintiffs had not suffered injury as a result of the alleged conspiracy. The Rainey plaintiffs now seek judgment n.o.v. or a new trial.

The Rainey interests had operated a dock facility which handled limestone and gravel; their claim in this action is that they would have entered the field of handling palletized iron ore but for the defendants' conspiracy. But their business ceased operations in 1959, and the jury could reasonably have concluded that their present claims represent convenient afterthoughts: There actually was little or no evidence to substantiate their bare assertions. There is no basis for post-trial relief in their case.

XV. CONCLUSION

For the reasons discussed above, orders will be entered denying all post-trial motions except the defendant's motion for judgment n.o.v., which will be granted with respect to National Steel's investment-cost claims, and denied in all other respects.

/s/ [Illegible]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1526/1586-1595/1627-1634

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.;
CONSOLIDATED DOCK AND STORAGE, INC.;
TOLEDO WORLD TERMINAL, INC.

VS.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Wills Trucking, Inc. and Toledo World Terminal, Inc., Appellants in 91-1526

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
Appellant in 91-1586

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.;
CONSOLIDATED DOCK AND STORAGE, INC.;
TOLEDO WORLD TERMINAL, INC.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1587

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1588

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02079),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1589

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION ; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (Civil No. 84-02134),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1590

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1591

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILROAD COMPANY; THE BALTIMORE & OHIO RAILWAY COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1592

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1593

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1594

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY; and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1595

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

C.D. Ambrosia Trucking Company ("Ambrosia"), Appellant in 91-1627

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02079),

Republic Steel Corporation,
Appellant in 91-1628

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02134),

National Steel Corporation,
Appellant in 91-1629

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION, THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Jones & Laughlin Steel Incorporated,
Appellant in 91-1630

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Wheeling-Pittsburgh Steel Corporation,
Appellant in 91-1631

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Tauro Brothers Trucking Company,
Appellant in 91-1632

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Sharon Steel Corporation,
Appellant in No. 91-1633

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Erie-Western Pennsylvania Port Authority and Codan Corporation ("Erie"), Appellants in 91-1634

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*.

SUR PETITION FOR REHEARING

The petition for rehearing filed by Bessemer and Lake Erie Railroad Company in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for re-

hearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker, Stapleton and Alito would grant rehearing.

BY THE COURT,

/s/ Mansmann
Circuit Judge

[Jul. 26, 1993]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1526/1586-1595/1627-1634

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.;
CONSOLIDATED DOCK AND STORAGE, INC.;
TOLEDO WORLD TERMINAL, INC.

vs.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Wills Trucking, Inc. and Toledo World Terminal, Inc., Appellants in 91-1526

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
Appellant in 91-1586

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

WILLS TRUCKING, INC.;
CONSOLIDATED DOCK AND STORAGE, INC.;
TOLEDO WORLD TERMINAL, INC.

v.

BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02010),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1587

IN RE: LOWER LAKE ERIE IRON ORE
ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1588

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02079),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1589

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (Civil No. 84-02134),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1590

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1591

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1592

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1593

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Bessemer and Lake Erie Railroad Company,
Appellant in 91-1594

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY; and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Bessemer and Lake Erie Railroad Company, Appellant in 91-1595

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

C.D. AMBROSIA TRUCKING CO., INC.

v.

CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-02012),

C.D. Ambrosia Trucking Company ("Ambrosia"), Appellant in 91-1627

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

REPUBLIC STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY (D.C. Civil No. 84-02079),

Republic Steel Corporation,
Appellant in 91-1628

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

NATIONAL STEEL CORPORATION

v.

PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02134),

National Steel Corporation,
Appellant in 91-1629

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

JONES & LAUGHLIN STEEL INCORPORATED

v.

THE PENN CENTRAL CORPORATION, THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02135),

Jones & Laughlin Steel Incorporated,
Appellant in 91-1630

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

WHEELING-PITTSBURGH STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; COMPANY; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-02138),

Wheeling-Pittsburgh Steel Corporation,
Appellant in 91-1631

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

TAURO BROTHERS TRUCKING CO.

v.

BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC.

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.
(D.C. Civil No. 84-02781),

Tauro Brothers Trucking Company,
Appellant in 91-1632

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

SHARON STEEL CORPORATION

v.

THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION (D.C. Civil No. 84-05562),

Sharon Steel Corporation,
Appellant in No. 91-1633

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION

(MDL No. 587)

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY and CODAN CORPORATION

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC. (D.C. Civil No. 84-05760),

Erie-Western Pennsylvania Port Authority and Codan Corporation ("Erie"), Appellants in 91-1634

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Present: Mansmann, Scirica and Roth, *Circuit Judges*

AMENDED JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 10, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered July 20, 1989 and June 18, 1991, be, and the same is hereby affirmed with the exception of

the grant of judgment n.o.v. against National Steel Corporation and the denial of the post-trial motions filed by Toledo World Terminal, Inc. and Wills Trucking, Inc. The grant of the judgment n.o.v. against National Steel Corporation is hereby reversed and the cause remanded for entry of judgment in National Steel's favor. The denial of post-trial motions by Toledo World Terminal, Inc. and Wills Trucking, Inc. is hereby reversed and the cause remanded for a new trial limited to the calculation of damages. All of the above in accordance with the opinion of this Court. Costs taxed in favor of Republic Steel Corp., Jones & Laughlin Steel, Wheeling-Pittsburgh Steel Corp., National Steel Corp. & Sharon Steel, Wills Trucking & Toledo World Terminal, C.D. Ambrosia Trucking, Erie Western PA Port Authority and Codan Corp.

ATTEST:

/s/ [Illegible]
Clerk

Dated: July 6, 1993

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No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

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QUESTIONS PRESENTED

1. Whether the holding of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), should be expanded to bar antitrust damages for any party—customer or competitor—when: (a) plaintiffs did not challenge the lawfulness of any rate filed with the Interstate Commerce Commission and did not seek any rebate of alleged filed-rate overcharges; (b) damages were not measured by reference to hypothetical regulated railroad rates; (c) the jury was specifically instructed that liability could not be premised on rate-related claims; and (d) the court of appeals "conclude[d] from the evidence produced that . . . plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims."

2. Whether, assuming *Keogh* is expanded to bar such antitrust damage claims by shippers, it should *further* be expanded to bar damages for competitors, where: (a) this Court's decisions and those of the lower courts have consistently declined to apply *Keogh* to competitor claims; (b) the competitor claims do not create the risk of discriminatory rebates that was the concern in *Keogh*, and (c) the competitors' claims are not measured by reference to hypothetical rates that would require Interstate Commerce Commission approval.

3. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), should be extended to bar the antitrust damage claims of the steel company plaintiffs, notwithstanding that the court of appeals in this and a related case held those steel companies to be directly-injured victims of a conspiracy to exclude competition.

RULE 29 STATEMENT

Pursuant to Rule 29.1, there are no parent or subsidiary corporations to be listed.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

Respondents C.D. Ambrosia Trucking Company (Ambrosia), Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), and Tauro Brothers Trucking Company (Tauro) respectfully oppose the petition for certiorari.

STATEMENT

There is nothing "extraordinary" about this antitrust case—except, perhaps, the audacity and scope of the illegal conduct at issue. In a 1989 jury verdict, Petitioner Bessemer & Lake Erie Railroad (B&LE) was held responsible for its leading role in a destructive 25-year

conspiracy that unlawfully monopolized the transportation of iron ore to this nation's steel mills.[1] In a prior criminal case, B&LE pled *nolo contendere* to antitrust charges based on its role in the conspiracy. *See United States v. Bessemer and Lake Erie Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983).

The Third Circuit's judgment in this case does not warrant plenary review. B&LE does not dispute the trial court's finding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy."[2] Nor does B&LE challenge the Third Circuit's holding, agreeing with the D.C. Circuit in the criminal case, that the Interstate Commerce Act afforded the conspirators no antitrust immunity. B&LE neither denies its role in the conspiracy nor questions the fairness of the proceedings that awarded compensation for its effect. B&LE instead asks this Court to immunize its misconduct from treble damages through a sweeping extension of the *Keogh* doctrine. Even with respect to this issue, however, B&LE does not challenge the instructions given the jury. Instead, B&LE seeks to manufacture a need for plenary review by presenting an incomplete and seriously distorted picture of what was decided below.

A. The Facts

Traditionally, iron ore in mud-like form was transported from mines in Michigan, Minnesota and eastern Canada across the Great Lakes on ships known as "bulk-

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[1] Although B&LE describes itself as a "small, 200-mile railroad," it was one of the largest carriers of iron ore in the nation during the period in question, and was established for the principal purpose of transporting ore from Lake Erie to the steel mills of Ohio and Pennsylvania.

[2] Appendix to Petition for Certiorari (Pet. App.), 97a (opinion denying motion for judgment notwithstanding the verdict).

ers." On arrival at docks on the south shore of Lake Erie, the ore was unloaded by huge and extremely expensive equipment, including large cranes known as huletts. From the docks, B&LE and other railroads transported the ore to steel mills in Ohio and Pennsylvania.[3] So long as ore remained in mud form, this transportation system was largely insulated from competition because the railroads controlled the huletts needed to unload the "bulker" ships, and the rail lines from the docks to the mills.

In the early 1950s, the advent of "pelletized" ore portended three important changes in ore transportation. First, because pelletized ore could be unloaded with a conveyor belt carried on the ship (rather than huletts on the docks), a larger and more efficient type of vessel—the "self-unloader"—could replace traditional bulkers. Second, because huletts and other heavy equipment were no longer necessary to unload ore, "private docks" not owned by the railroads could compete for iron ore business without facing the entry barrier of prohibitive capital investments. Third, because railroads could not bar private docks from dealing with motor carriers, trucks could compete with railroads for transportation of ore to the mills. Pelletized ore therefore made possible a new transportation system—self-unloaders, private docks, and trucks—that could move ore at a cost far lower than the monopoly rates charged by the railroads.

The railroads' own documents demonstrate their collective determination to squelch this threat to their monop-

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[3] Other railroads, including the New York Central (NYC), the Chesapeake & Ohio Railway Co. (C&O), the Baltimore & Ohio Railroad Company (B&O), the Norfolk & Western Railway Company (N&W), Penn Central Corp., and the Consolidated Rail Corporation (Conrail), also transported ore and were defendants in this case. Defendants other than B&LE settled before trial, or were dismissed from the case.

Self-unloaders could unload ore at almost any dock and could do so far more efficiently than the railroad-controlled system. Because these vessels, and not the dock, performed the unloading services, self-unloaders were direct competitors of the railroad docks. *Id.*; CA App. 2754, 4067.

2. B&LE and its co-conspirators quickly perceived their vulnerability to competition from an efficient, less costly alternative system. Beginning in 1956, in a series of secret meetings, that deliberately avoided ICC-mandated procedures governing rate bureaus, high-ranking railroad officials concluded that "something must be done to overcome the threat such inexpensive [non-railroad] facilities, which could spring up anywhere, are to our established ore facilities and charges." CA App. 6462. Recognizing that the new system depended on the availability of three interdependent components (self-unloaders, dock services and inland transportation), B&LE and the other railroads jointly attacked all three. Pet. App. 19a. For the next 25 years, B&LE and its co-conspirators adhered to, carried out and enforced their oral agreements by, among other means:

• Refusals to sell or lease property to non-railroad firms interested in offering low-cost self-unloader service to steel companies, and covenants or lease restrictions prohibiting use of property for such purposes. Pet. App. 19a; CA App. 3011-3013, 6589, 6888-89, 6900, 6904, 7155, 7952. Evidence at trial showed numerous sites along Lake Erie where the conspirators directly thwarted efforts to establish private iron ore docks. *See, e.g., id.* at 6888, 6889, 7155, 7952 (Erie); 3002-03, 6874-75, 7453-55, 7463, 7464-67 (Lorain); 6798-99, 6904 (Huron): 3424-27, 3430-31, 7024-25, 7057-59 (Whiskey Island); 3506-07 (Toledo); 8379, 8416-17, 8418, 8419, 8420; 3011-13 (Penn Central Docks, Huron, Conneaut, Lorain, Fairport, A&B Dock). One conspirator boasted that "[w]e have strongly resisted for years all proposals to sell or lease the Erie Ore Dock." *Id.* at 7952. Similarly, the conspirators blocked attempts to lease property for a self-unloader dock because "[i]f such a facility

is not established the [self-unloader] boats will not be attractive." *Id.* at 6875.

- Boycotts of non-railroad docks to prevent the handling of iron ore by unregulated entities the railroads could not control. Pet. App. 19a, 31a; CA App. 6469, 6527, 6535, 6579, 6596, 6876, 6894-95, 6898-99, 7546, 8260, 8391, 8393, 8394-96, 8419, 8420.

- Agreements not to act independently, and coercion and threats of retaliation against any co-conspirator that proposed independent action. Pet. App. 19a, 31a; CA App. 6527-28, 6579, 6631, 6637-38, 6640-41, 6643, 6890, 6894, 6897, 6950.

- Interference with efforts to transport iron ore by truck from non-railroad docks, eliminating the only cost-effective alternative to rail transportation. Pet. App. 19a, 31a, 57A; CA App. 3374, 7445, 7458, 7483, 7746, 7952.

- Refusals to allow self-unloaders to dock at railroad-owned facilities. Pet. App. 34a; CA App. 6495, 6883, 7311, 7317-18, 7391-92. B&LE specifically thought it "the better part of wisdom to discourage the self-unloader . . . ." *Id.* at 7317.

- Deliberately conducting the conspiracy in secrecy and acting outside ICC regulations and procedures. Pet. App. 95a-97a; CA App. 1273, 6457-59, 6460-63, 6483-84, 6495, 6631, 6640, 6890-91, 7154, 7312, 8242.

One episode epitomizes the depth, scope and effectiveness of the railroad conspiracy, and establishes that it was not the "rate" conspiracy petitioner suggests. In 1971, after successfully forestalling self-unloaders for 15 years, the conspirators were besieged by requests from steel companies to accommodate self-unloaders and non-railroad docks. *See* CA App. 7438. The "problem was all these [steel companies] wanted something better . . . . Everybody that had or thought he might have or could get the use of a self-

unloader was looking for less expensive transfer charges . . . ." *Id.* at 2860. At the same time, conspirator Chessie's outmoded dock equipment for handling bulker vessels was losing money. *Id.* at 7463. To serve its own business interest, Chessie negotiated to lease its dock facilities to non-railroad interests and "encourage use of self-unloaders." Bound by the conspiracy, however, Chessie was not permitted to act independently. *Id.* at 7441-42, 7456-59, 7460-62, 7465-67.

The conspirators' "negative reaction" to Chessie's plan was "immediate and vocal." CA App. 7454. They threatened "rate wars" on eastern coal routes (an entirely different commodity and a major revenue source for Chessie) (*id.* at 7444), warned that such leases could enable trucks to "break the rail rate on iron ore" (*id.* at 7458), and told Chessie that "concessions" to self-unloaders or to the steel companies could be avoided if "all lines hang together" (*id.* at 7436). *See also id.* at 7435-36, 7441-42, 7453-55, 7456-58.

The President and CEO of conspirator Penn Central wrote to his counterpart at Chessie concerning the "inherent dangers of including a separate commercial interest" in the iron ore transportation system, and objecting to "the intrusion of another principal who would perform an integral part of the transportation cycle on whatever selective commercial and product considerations he may choose." CA App. 7461. The threat to retaliate worked; Chessie did not lease its property. *Id.* at 7447, 7493-95, 7464, 7467.

3. It is preposterous for petitioner to argue that "there is no evidence" linking it to this conspiracy. Pet. 14 n. 9. B&LE was a leading figure in the conspiracy and a major transporter of iron ore. A wholly-owned subsidiary of U.S. Steel, B&LE had a special interest in preventing the use of self-unloaders by its parent's competitors. Because U.S. Steel was the last steel company to pelletize its ore and the last to have ore suitable for shipment by self-unloader, it was in U.S. Steel's economic interest to deprive its

competitors of a significant transportation cost savings while boosting the revenues of its B&LE subsidiary. CA App. 4100-01, 4317, 4324-27.

Consistent with this dual economic incentive, B&LE was an active member of the conspiracy. Pet. App. 19a. B&LE representatives attended and participated in the first and every significant conspiratorial meeting. CA App. 6457, 6483, 6897. Among B&LE's many overt acts in furtherance of the conspiracy were:

- *1956:* B&LE participated in the June 7, 1956 meeting at which the railroads reached their secret oral agreement to block the use of self-unloader technology to transport iron ore. CA App. 6457, 6460-63, 6532-34. B&LE and others agreed to eliminate existing service from private docks such as Columbus Road, National Terminal and Sycamore Slip. *Id.* at 6469. B&LE agreed with its co-conspirators to enact restrictive lease provisions to preclude competitors from operating private iron ore docks in competition with the railroads. *Id.* at 6454-56, 6478, 6485-86.

- *1961*: B&LE chaired a special study committee to investigate and ultimately block another railroad's proposal to handle self-unloaders. CA App. 6631, 6640-44.

- *1968*: When the conspirators learned that one railroad was planning to handle self-unloaders, B&LE instigated the collective response that squelched that threat to the conspiracy. CA App. 6883, 6887.

- *1971*: B&LE actively participated in the meeting at which the conspirators forced another railroad not to lease lakeside land for use by self-unloaders. CA App. 7435-36, 7453-55, 7456-59.

- *1976*: B&LE convened a meeting to discuss ways to combat competition from trucks. CA App. 7907-08. B&LE chaired a "Special Committee" to monitor truck competition; the committee held meetings in B&LE's offices,

and its final report was discussed at another meeting in B&LE's offices. *Id.* at 7943-45, 7955-89, 7990-91.

- *1978*: B&LE coordinated the railroads' joint response to an effort to ship ore from a non-railroad dock in Ashtabula. CA App. 8394-96. After learning of the potential use of the non-railroad dock, B&LE immediately contacted other conspirators and met with Conrail officials to formulate retaliatory action that stopped all further movements of iron ore from the non-railroad dock. *Id.*

4. The conspiracy had precisely the anticompetitive results B&LE intended. As early as 1956, the conspirators recognized that unless they acted to forestall competition from the new self-unloader technology, there would be a "switch in the movement of raw ore from 100% in bulk freighters . . . to substantial self-unloader movements." CA App. 6460. By 1967, the conspirators anticipated that, unless they acted, "10 of these large [self-unloader] vessels [will] be built in . . . the next 5-10 years." *Id.* at 6817. The conspirators' documents repeatedly confirm that, absent the conspiracy, there would have been a "proliferation" of non-railroad docks "springing up" all along the lake, which customers would have "preferred" over railroad docks. *Id.* at 2459-60, 6596. *See, e.g., id.* at 2464-65, 2470, 6460, 6528, 6575, 6890-91, 6900-01, 7460-63.

The steel companies were keenly interested in using the lower-cost alternative system to transport their iron ore. *See, e.g.*, CA App. 2961, 2954 (**Wheeling-Pitt**); *id.* at 2993, 3010-12, 3039, 3667-68, 3044, 4205 (**Republic**); *id.* at 2754, 2757-58, 2796-98, 2800-03, 2845, 4604, 4662, 7421-22, 7394 -7405 (**J&L**); *id.* at 3250-54, 3258-67, 3322, 7147-48, 8521 (**National**); *id.* at 3134-37, 3169-70, 3177-78, 3186-87, 3192, 3382-83, 7948 (**Sharon**). But, the conspiracy prevented steel company use of the new technology until the late 1970s and early 1980s. Full utilization of the alternative iron ore transportation system did not occur until after the conspirators were indicted in 1981. *Id.* at 2763, 2954-2956. Once allowed to compete, the new technology's efficiencies quickly made it

the prevailing mode of iron ore transportation. *Id.* at 2754, 2797-98, 2802-03, 2953-55, 3044. Today, virtually all iron ore is handled by self-unloaders.

District Court Proceedings

Pretrial Proceedings. The present consolidated civil cases were filed by respondents in various district courts from 1982 to 1984 . On April 17, 1984, the Judicial Panel on Multidistrict Litigation consolidated the ten cases and assigned them for pretrial proceedings before then Chief Judge John P. Fullam in the Eastern District of Pennsylvania. Pet. App. 20a. In pretrial rulings, the district court dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs" based on the allegation in the initial complaints that, absent the conspiracy, these plaintiffs would have paid lower railroad rates. App., *infra* 46A. Such damage claims, the court held, were barred by *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). *See* Pet. App. 21a. Accordingly, as both the district court and the court of appeals stated, these claims were not presented at trial and were not part of the damages awarded in the judgments affirmed by the Third Circuit. *Id.* at 96a, 29a-30a.

Prior to trial, the district court also ruled that steel company plaintiffs had standing to claim damages for injuries suffered as a result of the conspiracy. App., *infra* 38A-40A, 46A; *see* Pet. App. 21a-22a. The court held that the steel companies were directly affected by the railroads' exclusion of competing modes of transportation and handling services, and that the steel companies "claim to suffer one of the greatest antitrust harms, an inability to seek lower prices from competitors destroyed or delayed by an illegal conspiracy." App., *infra* 38A.

The Liability Trial. The liability phase of the consolidated trial lasted more than six weeks. Pet. App. 22a. The jury was comprehensively instructed on the "limited" application of the antitrust laws in the "heavily regulated [railroad] industry," including instructions on antitrust

immunity and the "concomitant principle" of *Keogh*. CA App. 4971, 4981. The jury charge explained regulated ratemaking and expressly instructed that "none of that kind of agreement or collusive activity would be a violation of the antitrust laws" and that "nobody can make a claim for damages measured by or based upon the fact that they paid a rate authorized by an ICC-approved tariff by claiming that that rate was too high." *Id.* at 4978, 5029-30. The jury was given a set of 20 special interrogatories including, over plaintiffs' objections, two questions proposed by B&LE allowing the jury to find B&LE not liable because of the regulatory environment: (1) Was "each act in furtherance of the . . . conspiracy . . . taken in a good faith belief that it was required by ICC regulations?" (2) Was B&LE's "conduct reasonable . . . under the regulatory policies under which defendant operated?" App., *infra* 62A.

The liability jury returned verdicts in favor of all but one plaintiff (Reaney). Pet. App. 22a. In answering the special interrogatories, the jury accepted some claims of the successful plaintiffs and rejected others. The jury found that B&LE participated in a conspiracy to monopolize and to restrain trade in violation of the Ohio Valentine Act and the Sherman Act; that acts in furtherance of the conspiracy occurred within the federal statute of limitations period; that B&LE did not withdraw from the conspiracy; that the conspirators affirmatively acted to conceal the conspiracy; and that the conspiracy in which B&LE participated was a material cause of injury to each successful plaintiff.[6] The jury also expressly rejected B&LE's "good faith" and "regulatory climate" defenses, answering "no" to the two questions included at B&LE's insistence. App., *infra* 62A.

The Damages Trial. During the damages trial before a new jury, plaintiffs again demonstrated that, absent the

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6 With respect to each steel company plaintiff, the jury found that antitrust injury resulted from "foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore" and "inability to fully use private docks to handle iron ore." App., *infra* 50A-54A

conspiracy, lower-cost self-unloaders and non-railroad docks would have developed earlier. To measure damages suffered by this delay, plaintiffs used contemporaneous financial and cost records of actual competitors, among other evidence, and estimated the costs that would have existed earlier. CA App. 5259-69, 5429-44, 5450-51, 5454-73, 10351. Steel company damages were measured by the difference between the costs they would have incurred by utilizing excluded *unregulated* competitors and the higher prices plaintiffs actually paid, shipment by shipment, ton by ton, during the relevant period. Pet. App. 23a; CA App. 5251, 5456-69, 10565, 10628, 10690, 10335-47, 10327. Dock and trucking company damages were measured by the profits each would have earned on the business from which they had been excluded. Pet. App. 23a. Plaintiffs' damage models avoided any overlap or duplication, and the jury was instructed that overlapping damages were prohibited. CA App. 6394-98.

Just as the liability jury had done, the damages jury accepted some of plaintiffs' claims and rejected others in whole or in part. The jury awarded only a portion of the damages sought by Republic, J&L and Wheeling-Pitt; rejected whole categories of damages sought by National, Sharon, Erie, Ambrosia and Tauro; and awarded only nominal damages to Wills. App., *infra* 48A-71A. Of the single damages awarded to all plaintiffs, more than 40% was awarded under Ohio's Valentine Act for a period in which no claim was made under federal law.

Post-Trial Proceedings. The district court denied substantially all of B&LE's motion for judgment notwithstanding the verdict. Pet. App. 24a-25a. The jury verdicts were reduced by $180.8 million to reflect settlements by other defendants, and judgments were entered aggregating $457.7 million. Pet. App. 24a-25a, 91a-121a. B&LE's former parent company, USX Corporation, executed a supersedeas bond to secure the judgments on appeal. CA App. 14.

Court Of Appeals Proceedings

A unanimous panel of the United States Court of Appeals for the Third Circuit affirmed the district court judgments in all respects material to the petition, with special praise for the district court's careful "shepherding [of] the parties and issues through the complexities of the lawsuit." Pet. App. 88a. Noting the pretrial dismissal of "*Keogh*" claims, the Third Circuit concluded that the claims that went to trial were based on forceful evidence of "the railroads' agreements to restrict the sale and lease of dock property, boycotts of unregulated docks, refusals to handle self-unloaders in a way that would make economic sense for a steel company to utilize them, and coercion to prevent independent action." *Id.* at 31a. The court of appeals found that B&LE engaged in "market preclusion," and that "the steel company plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims." *Id.* at 31a, 34a. Moreover, the Third Circuit observed that the jury was correctly instructed that rate-related conduct within the meaning of *Keogh* could not give rise to liability. *Id.* at 35a. The court explained that neither the injury nor the measure of damages implicated the "filed rate" concerns of *Keogh* (*id.* at 32a):

> It is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies was the absence of the lower cost combination.

The court of appeals rejected B&LE's additional argument that *Keogh* should also be extended to bar claims by competitors, such as the dock and trucking companies. Adhering to its longstanding precedent and to consistent holdings of the Second, Eighth and Ninth Circuits, the court

held that *Keogh* posed no bar to claims by competitors because "'[t]here is no policy conflict, actual or potential . . . between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.'" Pet. App. 36a (quoting *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1122 (3d Cir. 1979)).

In assessing antitrust standing, the Third Circuit applied the factors this Court enumerated in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), with respect to each successful claim. The court rejected B&LE's contention that Republic, J&L and Wheeling-Pitt lacked standing to recover their self-unloader damages (the savings they would have realized from utilizing the unregulated, lower-cost vessels that performed unloading services in competition with the railroad docks) because "it was unquestionably the steel companies who bore the brunt of the increased costs" caused by the antitrust violation. Pet. App. 51a.[7] The court explained the directness of this injury: "steel companies were the sole customers of the industry involved in the transhipment of ore; indeed the industry existed for them." *Id.* As the trial record established, "the steel companies suffered the greatest harm in connection with the delay in the use of the self-unloader technology," and the unmistakable directness of this harm weighed heavily in favor of the steel companies' standing. *Id.*

The court also held that steel company plaintiffs had standing to recover as dock-handling damages the difference between the amounts plaintiffs actually paid for dock-handling services and the lower costs of using alternative, unregulated docks. Again, the railroads' conspiracy unlawfully deprived steel companies of savings from the use of lower-cost, unregulated competitors that

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[7] B&LE did not challenge National's standing to recover damages related to National's ownership and operation of its own fleet of vessels. The Third Circuit noted that B&LE's arguments were inapplicable to National. Pet. App. 42a n. 11.

were an integral part of the alternative transportation system. Pet. App. 54a-55a.

ARGUMENT

The unanimous opinion of the Third Circuit fully considered and correctly applied well-settled legal standards to the lengthy, fact-intensive record in this case. The judgment below does not conflict with decisions of this Court or of any other court of appeals. This Court should decline petitioner's invitation to reweigh the facts found by two separate juries, upheld by the district court, and affirmed by the Third Circuit.

Three additional factors in this case strongly counsel against further review. **First**, petitioner's arguments are premised on glaring mischaracterizations of the record. Petitioner asks this Court to decide whether *Keogh* bars a claim "where tariff rates are the primary . . . means of precluding market entry" (Pet. i), but that is simply not this case. Contrary to petitioner's contention that this is *principally* a "rate" case challenging a price-fixing conspiracy of the sort alleged in *Keogh*, the jury found, with proper instructions and abundant evidentiary support, that B&LE participated in a conspiracy to exclude competition, implemented through activity that was not "rate-related" within the meaning of *Keogh*. The court of appeals affirmed, expressly reciting the non-rate conduct that directly injured plaintiffs and only "coincidentally implicate[d] rates." Pet. App. 32a. Petitioner's effort to transform such ancillary conduct into a cloak of protection for its ruthlessly predatory non-rate conduct is light years removed from the record, and merely seeks to relitigate in this Court fact issues on which the jury and both lower courts agreed. It is fatal to petitioner's request for review of "*Keogh*" issues that the district court dismissed all such claims prior to trial; accordingly, "rate-related" claims of the sort in *Keogh* and similar cases played no role in the judgments.

Similar distortions and omissions infect petitioner's request for review of the Third Circuit's recognition that no claims in this case are barred by *Illinois Brick*. Petitioner's argument is premised on the erroneous view that the Third Circuit upheld the judgments in favor of the steel companies "without regard to whether they have suffered antitrust injury." Pet. 27. The Third Circuit actually concluded that: (1) "B&LE's antitrust activity directly impacted the steel companies;" (2) "it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroads' agreement to thwart development of the less expensive technology;" and (3) the steel companies' alleged injury "was the type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." Pet. App. 51a, 52a. The liability jury similarly found that the conspiracy was "a material cause of any injury to the business or property" of each steel company plaintiff. App., *infra* 50A-54A. In short, this case does not present the questions that petitioner poses for review, and this Court should be especially wary of petitioner's invitation to decide such issues on the record of this case.

Second, the major statutory revisions of the regulatory scheme that occurred after the events at issue weigh decisively against certiorari here. The Staggers Rail Act of 1980 so transformed the regulatory landscape and the roles of the ICC and of railroad rate bureaus that B&LE advised this Court more than five years ago in a case arising from the same conspiracy that rate bureaus no longer exist and that issues of the sort raised in the petition are a "dead letter" and "virtually inconceivable" to arise "ever again." Br. in Opp., *Pinney Dock & Transport Co. v. Norfolk & Western Railway Co.*, No. 88-72 (Aug. 10, 1988), at 3, 6, 12. The likelihood of recurrence is even more remote today, making this case a singularly unsuitable vehicle for review.

Third, the unique factual setting and procedural posture of this case also caution against review: a successful conspiracy that forestalled development of a new and unregulated technological system for more than a

generation; conduct occurring some 15-35 years ago in a largely superseded regulatory climate; jury verdicts supported by abundant evidence pursuant to instructions petitioner does not challenge; and judgments anchored in substantial part in state law violations that the petition also does not challenge (and this Court would have no province to review). Review is all the more inappropriate because – without informing this Court – B&LE now retreats from and attacks positions it previously championed; and it relies on unpublished, nonprecedential authority (without so identifying it).

In sum, the petition is not rooted in this case, but in B&LE's flawed, after-the-fact reconstruction of the proceedings below. Petitioner may well have reason to re-think the litigation strategy it pursued in the lower courts, but it cannot re-write the extensive record of those proceedings. Certiorari should be denied.

I. PRIVATE TREBLE-DAMAGE ACTIONS FOR UNLAWFUL, NON-RATE ACTIVITY THAT EXCLUDES COMPETITION ARE CONSISTENT WITH DECISIONS OF THIS AND OTHER COURTS

The decision below does not hold that a conspiracy in which filed rates are the "primary," "dominant," or "core" component is subject to a private antitrust damage action. Pet. i, 9, 14. Nor, as the petition contends, did the Third Circuit "refuse[] to apply" precedents. Pet. 12. Rather, the decision below embodies a straightforward application of the holding in *Keogh*, reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), *viz.*, that a shipper cannot recover damages on the ground that regulated carriers fixed the rates it paid.

The Third Circuit correctly perceived that the claims in this case do not rest on a theory of price-fixing as they did in *Keogh*. All *Keogh* claims were dismissed by the district court

long before trial.[8] Based on those rulings, the claims that actually went to trial and are reflected in the judgments reviewed by the court of appeals are not within the rationale of *Keogh* and *Square D*.

Plaintiffs here proved a railroad conspiracy to preclude competition from an alternative, unregulated system of transporting iron ore. Pet. App. 32a. The excluded dock and truck competitors established as damages their lost profits. The steel companies proved that they were denied the benefits of a competing, lower-cost iron ore transportation system that was delayed by the conspiracy. *Id.* at 33a. The steel companies did not seek any damages for overcharges on railroad handling or rail transportation of their ore, which would be barred by *Keogh*; their dock-handling damages were the difference between amounts actually paid for dock-handling services and the lesser amounts that would have been paid to unregulated non-railroad docks if they had not been excluded by the conspiracy; and their self-unloader damages were the difference between the actual cost of bulker/railroad dock

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8 In Pretrial Order No. 4, the district court dismissed all claims in the original complaints "based on rates charged the plaintiffs by defendant railroads" and permitted amended pleadings if plaintiffs could separate rate-related claims from non-rate claims and could "show that carriers caused injury to the shipper's business or property other than by higher tariffs." App., *infra* 10A, 13A. (The defendant carriers in *Square D* cited this order as a correct application of *Keogh*, and appended the order to their brief in this Court. Br. in Opp., *Square D*, No. 85-21 (Aug. 2, 1985), at 2a; Resp. Br., *Square D*, No. 85-21 (Jan. 3, 1986), at 10). Pretrial Order No. 11 scrutinized the amended complaints from the perspective of *Keogh* and dismissed all rate-related claims involving hypothetical filed tariffs. At the same time, the court upheld claims based on illegal activities other than price fixing and claims for injuries "caused by actions outside the ICC's exclusive jurisdiction." App., *infra* 37A. Pretrial Order No. 49 reiterated that *Keogh* precluded rate-related claims by shippers and dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs including claims that, but for the alleged conspiracy, these plaintiffs could have obtained lower land-transportation costs." *Id.* at 46A.

At trial, B&LE did not object to evidence it now denounces as "rate-related." Indeed, B&LE itself introduced evidence of rates as part of its defense that the conspiracy involved only immune ratemaking. *See, e.g.*, CA App. 4075-76, 4099-4101, 4806-07.

shipments and the lower cost of using unregulated self-unloaders excluded by the conspiracy.

All plaintiffs' damage calculations accepted the lawfulness of all filed tariffs, and did not assume any change in railroad rates. Hypothetical railroad rates played no role in this case whatsoever. Based on its extensive review of the trial record, and taking into account the district court's pretrial rulings and jury instructions (which the petition ignores), the Third Circuit correctly recognized that the claims actually tried in this case are dispositively distinct from those addressed in *Keogh* and *Square D.* Pet. App. 31a-33a.

Keogh was a price-fixing case where plaintiff complained that filed rates violated the antitrust laws because they were jointly agreed upon; plaintiff sought damages based on the difference between those filed rates and hypothetical, lower filed rates. The decision below correctly observed that, in contrast, here "[t]he instrument of damage to the steel companies was the absence of the low-cost combination [of self-unloaders/private docks]." Pet. App. 32a. The Third Circuit is thus in full accord with the conclusion reached by the District of Columbia Circuit in affirming petitioner's antitrust conviction in the related criminal case, *viz.*, that the conspiracy here "only incidentally touched upon the setting of rates; its real purpose was to ward off outside competition heralded by the advent of the self-unloaders." 717 F.2d at 601. The Third Circuit repeatedly identified non-rate activity in support of its ruling, "particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors," and the court recognized that rate-related conduct was merely "coincidental[]" or "ancillary." Pet. App. at 32a, 33a. Nonetheless, petitioner invites the Court to reexamine the testimony of more than 40 trial witnesses and thousands of trial exhibits for vestiges of claims "primarily" based on rates, precisely the claims the district court dismissed prior to trial.

Petitioner's acknowledgment to this Court that the claims include non-rate-related conduct is a tactical retreat from its argument in the lower courts that **all** conduct in this case is rate-related. At trial, B&LE presented expert testimony that even the conspiracy's restrictions on the sale or lease of property were rate-related. Liab. Tr. 4105-06. According to B&LE, **anything** the railroads did to preserve their monopoly was rate-related. Similarly, in the court of appeals, B&LE repeatedly argued that "the judgments below were based **solely** on rate-related conduct." B&LE 3d Cir. Reply Br. 2 (emphasis added). *See also id.* at 18 ("Once Plaintiffs' Rate-Related Claims are Excluded, Nothing Remains Of Plaintiffs' Antitrust Claims, And The Case Should Be Dismissed"); B&LE 3d Cir. Br. 34 (same).[9] Having failed in the courts below with these extreme contentions, B&LE's certiorari-inspired conversion does not warrant this Court's consideration.

Square D provides an additional reason why this Court should decline petitioner's invitation to expand *Keogh*. In *Square D*, this Court reaffirmed *Keogh* on the narrow ground of *stare decisis* and because Congress had chosen not to alter *Keogh*. Neither of these factors justifies an expansion of *Keogh* to create new law that Congress has not addressed and that is not justified by precedent.

As petitioner concedes, *Square D* held that *Keogh* requires dismissal only of certain claims for injury caused by rate-setting conduct. *See* Pet 12. In *Square D*, this Court and the

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9 B&LE's aggressive arguments in the lower courts put the lie to its representation to this Court that "Petitioner has never contended that respondents are prevented from attempting to prove that non-rate-related activities by the railroads injured them." Pet. 14 n. 9. B&LE consistently pressed the view below that railroads are effectively exempt from the antitrust laws. In its opening statement at trial, B&LE argued that "in any other industry," the conspirators "would be guilty of per se violations of the antitrust laws [a]nd judges like Judge Fullam would be sending them away for a little vacation in places like Lewisburg." CA App. 2434. In the criminal case, the D.C. Circuit recognized that under B&LE's view, "any joint decision to freeze the level of services or to forego development of modern services would be an agreement as to 'rates.'" 717 F.2d at 601. It correctly rejected B&LE's argument, as did the Third Circuit.

Second Circuit permitted plaintiffs "to amend their complaints to state possible claims for damages not arising from the filed tariffs." 476 U.S. at 414.[10] That is precisely the course followed below by the district court and affirmed by the court of appeals. App., *infra* 18A, 25A; Pet. App. 29a-31a.

Similarly, in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), the Sixth Circuit held that *Keogh* precluded damages for rate-related conduct, but did not foreclose damages for unlawful non-rate conduct. As is clear on the face of the Sixth Circuit opinion, and as petitioner concedes, *Pinney* remanded to enable plaintiffs "to pursue non-rate related claims." Pet. 15, *see* 838 F.2d at 1457.[11] Far from triggering a conflict, the decision below expressly harmonized its holding with that of the Sixth Circuit, explaining that the full trial record here provides "definite evidence of the railroads' refusal to handle self-unloaders at their docks, restrictions on the sale and lease of dock property to unregulated entities, boycotts of unregulated docks and intra-industry coercion claims which mirror those deemed by the court of appeals in *Pinney* to escape *Keogh*." Pet. App. 34a. *See* 838 F.2d at 1457 (non-rate claims, such as restrictions on sale and lease of property, boycott of non-railroad docks, and coercion to prevent independent action fall "outside of the scope of the *Keogh* doctrine" and are "plainly not related to filed rates").[12]

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[10] Such non-rate claims were then asserted against the regulated carriers in *Square D*, and the litigation was later settled.

[11] Plaintiffs in *Pinney* amended their complaints to pursue non-*Keogh* claims which were settled by all defendants, including B&LE.

[12] The Third Circuit clearly explained why its opinion does not conflict with the Sixth Circuit's decision in *Pinney*. Even if there were any merit to petitioner's contention that the cases reached "disparate results" (Pet. 15), the very different records in the two cases preclude any true conflict.

One critical difference between this case and *Pinney*, which petitioner fails to bring to this Court's attention, is that plaintiffs in *Pinney* expressly waived all claims that the railroads failed to comply with their ICC-approved rate bureau agreement. 838 F.2d at 1460. Thus, the conspirators enjoyed the full extent of antitrust immunity under the

This Court denied certiorari in *Pinney* and there are compelling reasons for the same disposition here. As B&LE emphasized in opposing certiorari in *Pinney*, extensive changes in the statutory framework applicable to rail transportation reduce the regulatory-based issues to anachronisms with virtually no remaining jurisprudential significance. The Staggers Rail Act of 1980 transformed the operation of both the ICC and railroad rate bureaus. Pub.L. No. 96-448, 94 Stat. 1895 (codified as amended in 49 U.S.C. §§ 10101a *et seq.*). In B&LE's words, "the railroads' rate bureau ceased operations many years ago," making the scope of regulatory protection, or exemption, from antitrust remedies a "dead letter," "largely beside the point," and "virtually inconceivable ... to ... arise ever again." *Pinney*, Br. in Opp. at 3, 12. Changes imposed by the Staggers Act of 1980 include: circumscribing the immunity and rate-setting functions of bureaus (49 U.S.C. § 10706); substantially removing the ICC from rate-setting (*id.* at § 10701a); and exempting railroads from tariff filing and reasonableness determinations when a shipper contract is filed with the ICC (*id.* at § 10713). *See* Pet. App. 16a n. 2, 28a n. 3.

Five years after this Court denied review in *Pinney*, and thirteen years after the Staggers Act launched a regime of deregulation, there is even less reason to examine the role of *Keogh* on pre-Staggers Act conduct. As petitioner notes, in *Square D* this Court viewed *Keogh* as "an established

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Interstate Commerce Act, irrespective of *Keogh*. In this case, respondents did not waive such claims and the conspirators enjoyed no blanket statutory immunity. That issue was reserved for trial and respondents proved by overwhelming evidence that the railroads repeatedly violated procedural requirements. Indeed, the liability jury expressly rejected petitioner's regulatory framework and "good faith" defenses in response to special interrogatories. App., *infra* 62A.

Another key factual distinction is that *Pinney*, which arose in the context of interlocutory appeal under 28 U.S.C. § 1292(b) from the denial of motions for summary judgment, reached the court of appeals with both rate-related and non-rate-related claims remaining in the case. In contrast, the Third Circuit decision arose after all *Keogh* claims had been dismissed and following a full trial, which permitted the court of appeals to assess the evidentiary basis for the claims actually presented to the jury.

guidepost at the intersection of the antitrust and interstate commerce statutory regimes." Pet. 12 (quoting 476 U.S. at 423). The conduct in this case arose before the regulatory road map was materially redrawn; the "intersection" existing then has been closed. Even if the questions addressed in the petition were actually presented in this case, and even if those questions – in the abstract – merited review, the dated context of this case would severely limit any decision by this Court.

Nor will this case serve as a precedent for the application of *Keogh* to other industries, as petitioner contends. Pet. 18-19. The distinctive regulatory regimes in other industries present factual and legal differences that make this railroad transportation case an inadequate, and dangerous, vehicle to settle the application of *Keogh* in other, dissimilar contexts. Even in other regulatory contexts, the Court has recognized that not all invocations of the filed-rate doctrine merit review. *See, e.g.* the recent denials of certiorari in *United States Metroline Services, Inc. v. Southwestern Bell Telephone Co.*, No. 93-99, *cert. denied*, Oct. 4, 1993 (114 S. Ct. 183); *Ticor Title Insurance Co. v. Brown*, No. 92-1988, *cert. granted on other issue and denied on filed-rate issue*, Oct. 14, 1993 (114 S. Ct. 56).

II. THE QUESTION WHETHER *KEOGH* BARS CLAIMS BY COMPETITORS DOES NOT WARRANT REVIEW

For the same reasons that this case does not implicate the concerns of *Keogh*, it does not provide an opportunity for this Court to decide the subordinate question – relating only to some respondents – whether *Keogh* should be extended even further to bar claims by competitors.[13] It is also directly contrary to this Court's rationale in *Square D* for the

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[13] This aspect of the petition does not relate to claims by Republic, J&L, Wheeling-Pitt and Sharon, but only to claims by the dock and trucking companies and National. Both courts below held that *Keogh* has no application to National because it owned vessels for transporting and unloading iron ore and was a competitor of the railroad docks, not a customer. Pet. App. 29a n. 4, 101a.

seventy-year precedent of *Keogh* suddenly to be expanded. In any event, the Court denied review on this question in *Pinney* and should do so again.

The decision below broke no new ground; it merely applied longstanding precedents of the Second, Third, Eighth and Ninth Circuits. Pet. App. 36a. The Third Circuit also explained that in *Keogh, Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), and *Square D*, this Court did not address competitor claims, but rather claims by shippers that their rates were "higher than [in] a freely competitive market," that they would have been "charged a lower rate absent the conspiracy," and that they were entitled to "treble damages measured by that difference." Pet. App. 33a, 36a-37a n. 6. In those cases, private damage actions were barred for customers alleging that joint ratemaking activities had reduced competition among the defendant carriers, causing plaintiffs to pay rates set at a supracompetitive level. In contrast, the present case involves a conspiracy to exclude an alternative mode of transportation. Claims asserted by such excluded competitors do not conflict with the regulatory framework. And, as Judge Friendly's opinion in *Square D* recognized, in "suits by competitors rather than users of the service . . . many of the considerations relied upon in *Keogh* would not apply." 760 F.2d 1347, 1356 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986). In affirming *Square D* on other grounds, this Court carefully limited its language to claims by shippers (not competitors). After seventy years of applying *Keogh* to customer claims challenging rates, there is no justification for expanding *Keogh* to bar competitors' claims arising from market exclusion.[14]

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14 There is no merit to petitioner's reliance (Pet. 11, 16, 18) on *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 998 F.2d 1009 (4th Cir. 1993) (Table), pet. for cert. filed, No. 93-456 (Oct. 4, 1993). Petitioner's citation hides from this Court the fact that the Fourth Circuit's summary disposition in *Lifschultz* is an unpublished opinion with no precedential value. *See* Fourth Cir. Internal Oper. Proc. 36.6. On its face, the slip opinion states: "Unpublished opinions are not binding precedent in this circuit. *See I.O.P.* 36.5 and 36.6." Dkt. No. 92-2523 (4th Cir. July 6, 1993), slip op. 2. In any event, the Fourth Circuit's affirmance of the multiple and alternative grounds for granting summary judgment in *Lifschultz*

III. PETITIONER'S EFFORT TO EXPAND *ILLINOIS BRICK* DOES NOT MERIT REVIEW

The Third Circuit rejected B&LE's argument that the claims of Republic, J&L and Wheeling-Pitt are barred by *Illinois Brick* and its decision does not conflict with the decisions of this Court or any court of appeals.[15] The court's holding that these respondents have standing involves no new rule of general application; it is, rather, an unremarkable "exercise of judgment in deciding whether the law affords a remedy in [these] specific circumstances." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983) ("*AGC*"). Faithfully adhering to the principles and factors this Court has enumerated, the court below reached precisely the same conclusion that the Sixth Circuit reached in *Pinney*, at B&LE's urging, namely, that "[t]he steel companies . . . were the immediate victims" of the railroads' unlawful conspiracy to exclude alternative modes of transporting iron ore. 838 F.2d at 1462.[16]

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does not address or consider the Third Circuit's detailed opinion in this case, which had been issued more than one month earlier.

[15] The petition does not raise *Illinois Brick* or standing issues with respect to the dock and trucking company plaintiffs or National. Although the petition refers to "steel companies" without noting the factual differences in the steel companies' claims, its argument is directed to Republic, Wheeling-Pitt, J&L. B&LE did not raise an *Illinois Brick* argument against National in the court of appeals and is therefore barred from doing so in this Court. Even under B&LE's incorrect, overly-broad view of *Illinois Brick*, that case has no application to National, which owned its own fleet and was not a purchaser of the handling services performed by self-unloaders. Both courts below noted this unique aspect of National's claims. Pet. App. 42a n. 11; App., *infra* 33A-35A.

[16] In its briefs in *Pinney*, which B&LE acknowledges involved the same conspiracy considered in this case (Pet. 2), B&LE stated that the steel companies were directly injured parties. Brief of Defendant-Appellees/Appellants in *Pinney* at 35, 40, 42. Having successfully urged the Sixth Circuit to rule that the steel companies clearly have standing to recover for injuries caused by the conspiracy, B&LE is scarcely in a position to complain about an imagined "conflict." The fact is that both courts of appeals that considered the question held that the steel companies are direct victims, suffered antitrust injury, and have standing.

Petitioner thoroughly misunderstands *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Contrary to petitioner's contention, that case affirmatively supports the steel companies' federal antitrust claims here.[17]

Defendants in *Illinois Brick* conspired to fix the price of concrete blocks sold to masonry contractors; the masonry contractors sold the blocks to general contractors who used the blocks to construct buildings. Plaintiffs in *Illinois Brick* purchased those buildings from the general contractors and sued the block manufacturers to recover the illegal overcharge. This Court dismissed the claims of the remote purchasers for three reasons: (1) the risk of duplicative recoveries if all persons in the vertical chain of distribution who purchased and resold the product could sue; (2) the evidentiary complications in identifying affected parties and apportioning their damages; and (3) the difficulties of managing large, complex suits. *Id.* at 730, 738, 741, 745-47. The Court emphasized that increasing the cost of litigation and diffusing its benefits among a larger group of plaintiffs would seriously diminish the incentive to sue and thus reduce effective antitrust enforcement. *Id.* at 747.

To avoid duplicative recoveries, *Illinois Brick* restricted the class of plaintiffs to the first purchasers, the ones who were direct customers of the defendants. *Id.* at 737.[18] That is precisely the position of the steel companies in this case; they purchased dock-handling services directly from the conspirators. The steel companies are the only direct purchasers of iron ore transportation services. Indeed, the whole purpose of the conspiracy was to keep the steel

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17 The petition does not challenge respondents' claims under the Ohio Valentine Act, which its conduct was also found to violate. There is no occasion for this Court to review questions of state law that are not preempted by federal antitrust law. *Cf. California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989).

18 *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), also involved a price-fixing scheme in which a single unlawful overcharge was passed on by the initial purchaser to indirect purchasers in a vertical distribution chain.

companies as direct purchasers of the railroads and prevent them from becoming direct purchasers of new entrants with alternative means of handling iron ore (*i.e.*, self-unloaders and private docks). That is why the court below reached precisely the same conclusion that the Sixth Circuit reached in *Pinney*.

Nor are there any evidentiary complications or unusual difficulties in identifying the injured parties and apportioning their damages. The steel companies that lost the benefit of new entry and the dock and trucking companies who were excluded were all easily identified. As the Third Circuit noted, the damages suffered by the different classes of plaintiffs were analytically distinct so that apportionment did not present the difficulties of sorting out losses in a vertical distribution chain where degrees of passing on may be impossible to determine. Pet. App. 52a-53a, 89a n. 22. Not only are the damages analytically distinct, but each form of damage is of a sort familiar in antitrust litigation. The damages trial here was no more complex and arduous than it is in any large antitrust case.[19]

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[19] Petitioner's argument that every type of antitrust injury has, at most, a single type of victim, and thus a single category of plaintiffs with standing, has never been accepted by this Court or any court of appeals. The fallacy in petitioner's argument is particularly apparent in cases of market exclusion such as this, where this Court has held that standing "cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982) (injury suffered by customer of excluded psychologist did not duplicate injury suffered by psychologist); *see Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162-63 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1947 (1992) (publisher's refusal to allow consultants to place advertisements conferred antitrust standing on both competitor-consultants for lost profits and customer-advertisers for lost savings); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (defendant's conduct caused different direct injuries to football team that could not lease lower-cost stadium and to stadium that could not obtain lease revenues); *Pennsylvania Dental Ass'n v. Medical Service Ass'n*, 815 F.2d 270, 277 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987) (injury suffered by subscriber to boycotted health plan did not duplicate injury suffered by health plan); *Crimpers Promotions, Inc. v. HBO*, 724 F.2d 290, 293-294 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (defendants' antitrust damages would have been less if they had injured only the competitor-facilitator and not the producers and stations as well); *Litton Systems, Inc. v. AT&T*,

In any event, claims of all categories of plaintiffs were tried together in this consolidated multidistrict litigation. Since the steel, dock and truck company damage models excluded overlap, and the jury was expressly instructed not to award overlapping damages (CA App. 6394-98), there is no basis in this record for any such concern. Finally, the Third Circuit also properly rejected petitioner's simplistic effort to evade responsibility for the injury it inflicted: "we do not hold that litigation must be avoided solely because it might be difficult to ascertain damages." Pet. App. 53a.

Petitioner's version of *Illinois Brick* bears no resemblance to that case. Petitioner's analysis leads, not coincidentally, to the conclusion that no injured party has standing to sue and, therefore, that B&LE should be allowed to keep every cent of its millions of dollars of illegal profits. A rule could hardly be devised that would do greater harm to antitrust enforcement.

IV. THE HOLDING THAT THE STEEL COMPANIES HAVE STANDING TO RECOVER FOR INJURIES DIRECTLY CAUSED BY THE CONSPIRACY IS IN ACCORD WITH SETTLED PRINCIPLES

Petitioner misrepresents the record by stating that the Third Circuit held that although *Illinois Brick* bars the steel companies' claims, plaintiffs may avoid that bar under a balancing of *AGC* factors. That is not the Third Circuit's holding and, therefore, the "conflict" petitioner conjures up simply does not exist. Rather, after correctly holding that *Illinois Brick* posed no bar, the decision below applied the *AGC* factors to the particular facts, just as other circuits do.[20]

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700 F.2d 785, 821-22 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (standing recognized for both customer and competitor claims).

20 *E.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 295 (1992); *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 960-63 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24, 27-31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n.*, 830 F.2d 1374, 1382 (7th Cir. 1987); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1363

Illinois Brick aside, petitioner does not challenge the Third Circuit's application of the *AGC* factors to the claims of Republic, J&L and Wheeling-Pitt.

The Third Circuit's routine application of the factors prescribed in *AGC* presents no question warranting review. In *AGC*, this Court emphasized that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case" (459 U.S. at 536), and, therefore, one must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535.

The Third Circuit undertook precisely the analysis this Court required in *AGC*, and correctly concluded that the steel companies satisfied the applicable standards. The court of appeals observed that "[t]he steel companies were the sole customers involved in the transhipment of ore; indeed, the industry existed for them." Pet. App. 51a. Also, because the goal of antitrust laws is "to assure customers the benefits of price competition[,]" (*id.* at 52a, citations omitted), the Third Circuit correctly found that the steel companies' injuries were of the type that Congress sought to redress.[21] Finally, the Third Circuit recognized that because

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(9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); *Walker v. U-Haul Co.*, 747 F.2d 1011, 1014 (5th Cir. 1984); *Crimpers Promotions, Inc. v. HBO, Inc.*, 724 F.2d 290, 297 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984).

[21] An alternative ground for affirming the judgment in this case is the trial court's finding that the steel companies were competitors in the restrained market by their investment in and ownership of transportation equipment and facilities that reduced their costs, and that "but for the conspiracy, [the steel companies] would have been similarly involved with self-unloaders, and would have achieved direct cost-reductions." Pet. App. 101a. Contrary to petitioner's contention that the Third Circuit "expressly rejected" (Pet. 8) this alternative basis for liability, the court noted that the district court's rationale "might well relieve the steel companies from dismissal under *Illinois Brick*." Pet. App. 44a. Given its alternative disposition, the Third Circuit did not reach or dispose of this ground for affirmance. Thus, even if there were any merit to petitioner's attack on the stated basis for the judgment below, that would not lead to reversal of the judgment, which could be affirmed on the alternate ground upon which the district court relied. In short, the question posed

petitioner's exclusionary conduct caused two unique forms of direct antitrust injury, the steel companies' claims and the claims of the precluded competitors were not duplicative. *See* Pet. App. 52a-53a, 89a n. 22.

The decision below is also consistent with this Court's holding in *Blue Shield v. McCready*, 457 U.S. 465 (1982), that a health plan subscriber had standing to sue Blue Shield for conspiring to exclude clinical psychologists from a segment of the psychotherapy market. This Court observed that Section 4 of the Clayton Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 472 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

Consistent with this Court's teachings, the Third Circuit found that the harm to the steel companies "was clearly foreseeable," indeed, they were the intended victims. The injuries they sustained were an "integral aspect" of the conspiracy because "the steel companies suffered the greatest harm in connection with the delay of the use of the self-unloader technology." Pet. App. 51a. The injury the steel companies suffered and the injury the conspirators sought to inflict were the same – and precisely the injury the Sherman Act was enacted to prevent. *Id.* at 52a (quoting *AGC* and *McCready*). Accordingly, the decision below is in full accord with the antitrust standing principles announced by this Court.

In holding that the steel company plaintiffs have standing, the Third Circuit agreed with the Sixth Circuit's conclusion that the steel companies were immediately and directly injured victims of the railroads' conspiracy to monopolize services for transporting and handling iron ore.

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by the petition is directed only at language in the opinion below and would not affect the judgment.

The application of these settled principles to the massive evidentiary record in this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 23, 1993

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO:	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

MEMORANDUM AND PRETRIAL ORDER NO. 4

FULLAM, J. June 5, 1985

In this multidistrict litigation (MDL), 11 antitrust suits have been consolidated in this court for pretrial proceedings. Among the many motions now before the court are defendant railroads' motions to dismiss or, in the alternative, for a stay pending reference of certain issues to the ICC, filed in the actions brought by the steel company plaintiffs.[1]

The steel companies, Jones & Laughlin Steel, Inc. (Jones & Laughlin), Republic Steel Corp. (Republic), National Steel Corp. (National), Wheeling-Pittsburgh Steel Corp. (Wheeling-Pittsburgh), and Sharon Steel Corp. (Sharon), allege (as do all of the MDL plaintiffs with minor variations), that from the mid-1950s "until at least 1980" the railroad defendants (The Penn Central Corp., The Chesapeake & Ohio Railway Co., The Baltimore & Ohio Railroad Company, CSX Corporation, Bessemer and Lake Erie Railroad Co., Pittsburgh and Lake Erie Railroad Co., Consolidated Rail Corp., Norfolk & Western Railway Co., and Norfolk Southern Corp.) and other non-defendant railroads conspired to destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other bulk commodities along lower Lake Erie.

Accepting as true all of plaintiffs' allegations, as I must on a motion to dismiss, the relevant facts are as follows. Much of the iron processed into steel by plaintiffs originates in mines located in Michigan, Minnesota, and Eastern Canada. The ore is shipped across the Great Lakes and unloaded at docks along lower Lake Erie in Pennsylvania and Ohio. Many of these docks were and still are owned by defendant railroads, and these docks were the primary

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[1] This Memorandum does not address Penn Central's motions to dismiss, which rest on alternative grounds. Those will be addressed in a subsequent memorandum.

handlers of iron ore. For many years, the prevailing method of unloading bulk commodities was by means of huletts, large cranes affixed to the docks. The huletts lifted the ore and other bulk commodities from the ships, known as "bulkers" or "straight deckers"; the cargo was then placed either in waiting railroad cars for immediate transportation or in a location designated for later movement to storage. During the period of the alleged conspiracy, rates for these services at all of the railroad docks were identical. The non-railroad docks in the vicinity were not equipped with huletts, and thus could not compete for iron ore traffic.

In the 1950s, some iron ore producers began to "pelletize" their ore. This innovation made possible the transport of iron ore by means of already existing self-unloading vessels. These vessels, as their name implies, were capable of unloading themselves by means of a conveyor belt. According to plaintiffs, the self-unloaders greatly lessened dock-handling time, and with the advent of "super-size" self-unloaders in the 1960s, these ships could carry twice the load carried by the conventional bulkers and could unload themselves in one-fourth the time at docks with no special handling equipment. Plaintiffs claim that the railroads, loath to lose supremacy in the iron ore trade to non-railroad docks, and fearful of losing their substantial investments in potentially useless off-loading equipment, determined to halt the progress of self-unloader technology,[2] in part by keeping dock-handling rates for self-unloaders artificially high. The railroads charged the steel companies the same dock-handling rates for the self-unloaders as they did for the bulkers, thereby diminishing the economic attractiveness of water shipment by self-unloaders.

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[2] Litton Industries, at one time a producer of self-unloading vessels, has brought suit against defendant railroads on grounds identical to those present in these cases. That case, proceeding in the Northern District of Ohio, was not consolidated for pretrial purposes with the other actions in this MDL.

A further aspect of the alleged conspiracy involves line haul rates, which are the rates charged by the railroads for transporting the ore and other commodities from specific docks to the plaintiffs' mills. Plaintiffs charge that the rates from defendant railroads' docks to all the steel mill customers were identical, notwithstanding the difference in distances. Moreover, plaintiffs charge that the private commercial or non-railroad docks[3] were effectively precluded from handling ore from the self-unloaders by defendants' refusal to publish competitive commodity line haul rates[4] from the private docks to the steel mills, and the concomitant inhibition of truck competition for land transportation.

The steel company plaintiffs charge that, by the conduct elucidated above, defendants violated §§ 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, 3). Jones & Laughlin, Wheeling-Pittsburgh, and National also claim that this behavior gives rise to violations of the antitrust provisions of the District of Columbia Code (D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508). All plaintiffs seek treble damages, attorneys fees, and costs pursuant to § 4 of the Clayton Act (15 U.S.C. § 15). Jones & Laughlin, Republic, and Wheeling-Pittsburgh also specifically seek injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). (Sharon and National do not, but instead include a catchall request for other appropriate relief.)

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[3] Those docks are represented in this litigation by Erie-Western Pennsylvania Port Authority and Codan Corporation. Pinney Dock and Transport Company is also pursuing an action against the defendant railroads in the Northern District of Ohio; that action was not consolidated for pretrial purposes with the other actions in this MDL.

[4] Commodity line haul rates are, in general, cheaper than class line haul rates. Plaintiffs claim that Pittsburgh and Lake Erie Railroad Company tried to take independent action in establishing such competitive commodity line-haul rates in response to trucking competition in 1977, but was thwarted by pressure from other defendant railroads. Nevertheless, all railroads had published such competitive rates by March 1978.

I. PLAINTIFFS' CLAIMS FOR DAMAGES

Plaintiffs' damage claims are couched in terms of "denied savings," *i.e.*, they claim that the railroads' predatory behavior denied them (1) the across-the-board savings that would have resulted from swifter development of self-unloader technology; (2) the savings that would have resulted from lower dock-handling rates at private commercial docks had the self-unloader industry been more robust; (3) the savings that would have resulted from lower dock-handling rates at the railroad docks, had there been competition from private docks; (4) the savings that would have resulted from lower trucking rates, had such competition not been restrained; (5) the savings lost as a result of the railroads' artificially high line-haul rates; and (6) the savings plaintiffs would have realized had they had the option to choose the most efficient and economical combination of transportation alternatives. *See, e.g.*, Complaint of National at ¶ 28.

A. Antitrust Immunity

The defendants in the present case are members of a protected and highly regulated industry, now charged with violating the antitrust laws. For the public good, participants in such industries are permitted a measure of freedom to cooperate with each other not enjoyed by those engaged in other endeavors, on the theory that the public's interest in preventing conspiracies in restraint of trade and monopolies must be partially subordinated to the public's need for the services being rendered. But, of course, this accommodation does not totally immunize the defendants from antitrust scrutiny.

The defendant railroads' limited antitrust immunity has two sources: the statutory immunity conferred by the 1948 Reed-Bulwinkle Amendment to § 5(a) of the Interstate Commerce Act (ICA) and the opinion of the Supreme Court

in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

Keogh was a manufacturer of excelsior and flax, who shipped his goods via defendant railroads. The railroads were members of an association through which uniform interstate rates were set. These rates had been duly filed with the Interstate Commerce Commission (ICC); moreover, the rates had been investigated by the Commission and found reasonable. Nevertheless, Keogh claimed that the rates were discriminatorily set by an unlawful conspiracy in violation of the antitrust laws.

The Court ruled otherwise; it held that the shipper could not recover treble damages "because he lost the benefit of rates still lower, which, but for the conspiracy he would have enjoyed." 260 U.S. at 162. Justice Brandeis, writing for a unanimous court, gave several reasons for this result. First, he noted that the "Act to Regulate Commerce" (the ICA) is the proper vehicle for determining the legality of a rate. Under its enforcement provision (now at 49 U.S.C. § 11705), a shipper could receive actual damages and attorneys fees. He questioned whether Congress could have "intended to provide the shipper, from whom illegal rates had been exacted, with an additional remedy under the Anti-Trust Act." *Id.* at 162.

Second, Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. To rule otherwise, he concluded, would allow piecemeal discrimination in favor of shippers who chose to

litigate. Finally, Justice Brandeis concluded that the damages sought were both hypothetical and speculative.

Plaintiffs here contest the application of *Keogh* to these cases, arguing that the immunity it provided was subsumed by the express immunity conferred by the Reed-Bulwinkle Act, that subsequent rulings of the Supreme Court demonstrate that *Keogh* is distinguishable on its facts from the present cases, and that its rationale is no longer compelling. For the reasons that follow, I reject plaintiffs' arguments.

The Reed-Bulwinkle Act amended the ICA to allow the railroads to enter into agreements to establish jointly rates, classes, routes, and the like, so long as these agreements are first approved by the ICC. *See* Pub. L. No. 80-662, 62 Stat. 472 (1948) (amending § 5(a) of the ICA) (current version *as amended* at 49 U.S.C. § 10706). In order to gain approval, such agreements must preserve the right of any party to act independently. *See* 49 U.S.C. § 10706(d)(2)(C). So long as the procedures set forth in the agreement for joint activity are followed, railroads are shielded from antitrust liability for that activity.[5] Under the statutory provisions in effect during the bulk of the alleged conspiracy period, any party, including the ICC, could initiate proceedings to determine whether the rates so promulgated were reasonable and/or whether they were issued pursuant to appropriate agreement procedures.[6] If the ICC concluded that the filed

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[5] The defendant railroads are parties to the Eastern Railroads Agreement. *See* 277 ICC 279 (1950). The Coal, Coke and Iron Ore Committee (CCIOC) was established by defendants to carry out the agreement by, *inter alia*, meeting publicly to discuss and propose rates. Plaintiffs charge that defendants failed to comply with the agreement procedures in setting rates, although this charge is only a corollary to plaintiffs' larger concern with the railroads' predatory behavior.

[6] Significant changes have been made in the jurisdiction of the ICC by recent legislation. *See* The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); The Railroad Revitalization And Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976). Although the ICC's power to regulate rates has been curtailed, it still possesses the authority to ensure that rates are promulgated pursuant to approved agreements and to award damages, costs, and attorneys fees as reparation for illegal

rates were improper for any reason, it could disapprove them and, if circumstances warranted, award the complainant its actual damages, together with costs and attorneys fees. *See* 49 U.S.C. §§ 10706, 10762, 11705.

An exhaustive review of the legislative history of the Reed-Bulwinkle Amendments is found in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, No. 84-7831 (2d Cir. Apr. 9, 1985), in which the court rejected every argument pressed by plaintiffs here, and concluded that the rule of *Keogh* is still valid.[7] In light of the admirable summary presented by Judge Friendly in *Square D*, I will present here only a brief capsulization of the relevant history. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 401 (1945), decided shortly before the enactment of Reed-Bulwinkle, the Court held that *Keogh* barred Georgia from recovering treble damages in its *parens patriae* suit against defendant railroads for price-fixing on the basis of rates paid by private shippers. The Court noted, however, that *Keogh* was not a bar to government or so-called public antitrust actions against the railroad; nor did it prevent private shippers from obtaining injunctions against conspiratorial behavior, a matter not within the jurisdiction of the ICC. *See id.* at 454-55. Nor does *Keogh* apply to suits by competitors. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, No. C80-1733, slip op. at 46 (Memorandum and Order denying Motion to Dismiss) (N.D. Ohio Aug. 26, 1983).

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rates. In any event, much of the conspiracy here alleged occurred before the enactment of the amendments alluded to above, and plaintiffs have not suggested that these amendments are in any way outcome determinative.

[7] As transferee judge, I am bound to apply the law as if I were sitting in the transferor district. *See Manual for Complex Litigation* § 5.22 n.410 at 197 (2d ed. 1984). Hence, I am bound by the Second Circuit's determination in *Square D, supra*, in ruling on the present motion in the *Republic Steel* case, which was filed in the Southern District of New York. The other four cases were filed in the District of Columbia; I am aware of no binding precedent treating *Keogh* in that Circuit.

There being a general consensus to the effect that the public would be better served by filling some of the gaps alluded to in *Georgia*, at least to the extent that railroads could not be subjected to antitrust liability by any entity for the appropriate joint setting of rates, routes, fares, classifications, etc., Reed-Bulwinkle was enacted. As Judge Friendly points out in *Square D*, Congress had been reminded of *Keogh* several times during the hearings that preceded the bill's enactment (*see Square D, supra*, slip op., at 3269-70), and nevertheless announced:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body . . . .

H.R. Rep. No. 1100, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

Several courts have thus rightly held that *Keogh* was not swallowed up by Reed-Bulwinkle. *See, e.g., Square D, supra; In the Matter of Wheat Rail Rate Antitrust Litigation*, Nos. 84-1883, 84-1505 (7th Cir. Apr. 17, 1985). As I noted above, *Keogh* held that shippers could not pursue antitrust claims for treble damages against railroads on the basis of filed rates (although plaintiffs dispute this latter characterization, *see* discussion *infra*). Reed-Bulwinkle extended that protection by granting immunity against suits from all comers, not simply shippers, for all matters, not simply filed rates, that were jointly undertaken in compliance with an ICC-approved agreement; thus, the simple act of filing rates would not be sufficient to warrant Reed-Bulwinkle protection, but would, under the right circumstances, warrant *Keogh* protection. In view of Congress' expressed intention that Reed-Bulwinkle only add to the railroads' existing antitrust protection, it would be improper to shun *Keogh* on this basis.

Finally, as Judge Friendly noted:

> Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

Square D, supra, slip op. at 3269.

Plaintiffs next contend that their cases do not fall within the proscriptions of *Keogh*, since (1) *Keogh* was a "rate" case, and in this case a much broader conspiracy is alleged, rates being only a "symptom" of the problem, and (2) the rates in *Keogh* had been approved by the ICC, whereas the rates charged here were simply filed with the ICC, thus occasioning no conflict between agency and court jurisdiction.

I do not find these arguments persuasive. Although it is true that the conspiracy alleged goes farther than the mere fixing of rates, that does not divest the court of its duty to ensure that antitrust immunity is afforded as the law directs. The attempts of both sides of this litigation to label it as a rate matter or a monopolization matter do little to advance the inquiry. I am aware of no law that dictates that I view these actions with tunnel vision; on the contrary, a legal line has been drawn by the *Keogh* court which I am not free to cross, no matter how "artificial" it may seem to plaintiffs. *See, e.g., Square D, supra*, slip op. at 3248-49, 3282 ("A shipper [should be allowed to amend its complaint and] may recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales."). The portion of plaintiffs' damage claims which involves rates must, under *Keogh*, be separated from the rest of the action.

And this is so whether the rates at issue have been approved by the ICC or simply filed with that body. *See*,

e.g., Square D, supra, slip op. at 3280. As noted above, Justice Brandeis clearly stated in *Keogh* that the filed rate is "the legal rate" under the ICA unless and until the rate is disallowed by the ICC or otherwise displaced. 260 U.S. at 163. Notwithstanding this straightforward language, plaintiffs argue that subsequent Supreme Court decisions have revealed that ICC approval is a prerequisite to *Keogh* immunity. In *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.*, 392 U.S. 481 (1968), the Court rejected the "passing on" defense to claimed overcharges in antitrust suits. The *Hanover* Court took note of *Keogh* in a footnote, since Justice Brandeis had appeared to give credence to that defense. He wrote that the same legal rate had been exacted from all shippers, and that a lower rate (one that would have existed but for the conspiracy)

> might not have benefited [*Keogh*] . . . . Under these circumstances, no court or jury could say that, if the rate had been lower, *Keogh* would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Keogh, 260 U.S. at 165. The *Hanover* Court stated that in *Keogh* "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws . . . . We ascribe no general significance to the *Keogh dictum* for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Hanover*, 392 U.S. at 491 n.8. It is thus clear that the concern of the *Hanover* Court was to distance itself from one of several arguments advanced by Justice Brandeis in support of his ruling in *Keogh*. The Court did not, and indeed had no need to focus on the issue of filed rates versus approved rates. Hence, it would be folly to hold that the

dictum in *Hanover* rejecting the dictum in *Keogh* in any way detracts from the holding of the latter.[8]

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 20 (1966), the Court held that a shipper in foreign commerce could maintain an antitrust action for treble damages against maritime conferences and their members based on rates set without prior approval of the Federal Maritime Commission (FMC) pursuant to the Shipping Act. The Shipping Act, like the ICA, provides the commercial maritime industry with limited antitrust immunity for rates jointly set in accordance with FMC-approved agreements. *See* 46 U.S.C. § 814. Without mention of *Keogh*, the Court held that if rates were set pursuant to an unapproved agreement, the carriers could be subjected to antitrust liability for joint rate-setting. Paying due heed to the doctrine of primary jurisdiction, the Court concluded that such an antitrust action, whether for damages or for an injunction, should be stayed pending the FMC's resolution of whether the rates were set in conjunction with an approved agreement. *Id.* at 221, 223. If the FMC should find that the rates were not lawfully set, the shipper would then have the option of seeking recovery under the Shipping Act or under the antitrust laws. *Id.* at 224.

The shippers in the present cases do not overtly argue that *Carnation* overrules *Keogh sub silentio*, but that it limits its application to approved rate cases. But the *Carnation* Court was concerned with unapproved agreements, not unapproved rates.[9] Moreover, it was construing an

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[8] The same may be said with respect to *Terminal Warehouse Co. v Pennsylvania R.R. Co.*, 297 U.S. 500 (1936), which the plaintiffs argue is inconsistent with *Keogh*. But, although the *Terminal Warehouse* Court found *Keogh* "apposite and helpful", it stated that it was not "decisive". *Id.* at 511. Its musings regarding when an antitrust action may be pursued by a shipper are dicta and cannot be construed to alter *Keogh*. *Id.* at 515.

[9] Indeed, one might venture that if *Keogh* were to be read as an approved rate case, the *Carnation* Court would have cited it as support for its position that in un- or disapproved rate cases, an antitrust action could lie.

exemption contained not in the ICA, but in the Shipping Act, a statute which, albeit similar in many respects to the ICA, is not at issue in the present cases. Nor was the *Keogh* Court confronted with a statutory exemption of any kind, since none existed in the ICA at that time.

Hence, I must reject plaintiffs' contention that *Keogh* does not apply to this case, and with it their arguments regarding the changing regulatory climate. *Keogh* continues to be cited by the Court as good law. *See, e.g., ATA v. McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980). *See also Minsky v. Auto Driveway Co.*, 757 F.2d 718 (7th Cir. 1984); *Square D, supra; Wheat Rail Cases, supra; Essential Communication Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). Although plaintiffs may well be correct in arguing that the Supreme Court would elect to overrule *Keogh* if it had the opportunity to do so today, that is not for this court to decide.

Thus, insofar as plaintiffs' damage claims are based on rates charged the plaintiffs by defendant railroads -- all dock-handling and storage rates at railroad docks and railroad line haul rates (class or commodity) from private and railroad docks -- their claims will be dismissed.

As I read the various complaints, this leaves the steel companies with two presently animated antitrust claims: (1) that they could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) that they could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks.[10] In my view,

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[10] In Jones & Laughlin's summary of facts, presented to the transferor court but not alluded to in its present motion to dismiss, it contends that the railroads intended to "cramp" the trucking industry by, *inter alia*, threatening "elimination of services to steel companies." Puzzlingly, however, no such allegation of a refusal to deal by the railroads is found in any of the present steel company complaints, nor for that matter, in the

plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination of transportation alternatives come within these two categories.

Defendants vigorously contest plaintiffs' standing to pursue these remaining claims.

B. Antitrust Standing

The definition of who may be an antitrust plaintiff has been an elusive one. From the wording of § 4 of the Clayton Act (15 U.S.C. § 15), one might not have imagined that such a problem would evolve:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Read literally, this all-encompassing language would seem to contemplate litigation recoveries by all who claim to have suffered any form or degree of antitrust injury. But the courts do not read this section literally; indeed, over the years, the appellate courts have devised a variety of tests, through which prerequisites for maintaining suit beyond the simple allegation of injury have been engrafted upon this language. *See Merican, Inc. v. Caterpiller Tractor Co.*, 713 F.2d 958, 964, n.12 (3d Cir. 1983) (and cases cited therein).

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complaints of the trucking companies. Hence, none is now properly before the court.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court attempted to harmonize the various standards by setting forth a list of factors which are to "circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537. As elucidated by our court of appeals in *Merican, supra*, those factors are (1) the causal connection between the alleged antitrust violation and the harm to plaintiff (specific intent to harm plaintiff is not required); (2) the nature of plaintiff's injury (Is it the sort of injury Congress intended § 4 to address, and does it flow from the unlawful nature of defendant's acts?); and (3) the directness or indirectness of the injury. *Merican*, 713 F.2d at 964-65 & nn.13-15 (citing *Associated General Contractors*, 459 U.S. at 537-40).

The latter factor requires an analysis of (a) whether there exists "an identifiable class of persons whose self-interests would normally motivate them to vindicate the public interest"; (b) the speculative nature of the damages; (c) the potential for duplicative recovery; and (d) the danger of the court becoming involved in complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 541-44; *Merican*, 713 F.2d at 965 n.15. This final set of considerations is precisely the one focused upon in *Hanover Shoe, Inc., supra*, and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); in *Hanover*, the Court rejected the "passing on" (of the overcharge) defense to the claim of an innocent middleman in a price-fixing scheme, and in *Illinois Brick*, the Court completed its thought: it barred the indirect purchaser from maintaining an antitrust action based on the overcharge.

Although plaintiffs clearly allege the requisite form of injury, and thereby satisfy the second requirement of *Associated General Contractors*, their claims cannot withstand the scrutiny mandated by factors 1 and 3.

With respect to factor 3, the Third Circuit's opinion in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d

573 (3d Cir. 1979), is instructive. The *Mid-West Paper* court applied the *Hanover Shoe-Illinois Brick* rationale to a case without a middleman,[11] a case analogous in many respects to those presently under consideration. The court held that a customer of a non-conspiring competitor of defendant supplier could not maintain an antitrust action based on an "umbrella" pricing theory (*i.e.*, the notion that the effect of defendant's conduct in an oligopolistic market was to inflate the prevailing market rates charged by all competitors in the relevant market, and not simply by defendant). In an analysis which mirrors that prescribed by *Associated General Contractors*,[12] the Court conceded that the nature of plaintiff's injury was within the reach of the antitrust laws (factor 2), but ruled that the chain of causation was too speculative (factor 1) and the amount of the damages too conjectural (factor 3). *Id.* at 584. Said the Court:

> The outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural. As noted in *Hanover Shoe*, "[a] a wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact; . . . ."

Id.

The *Mid-West Paper* opinion was not met with universal agreement (*see, e.g., In re Uranium Antitrust Litigation*, 552 F.Supp. 518, 523 (N.D. Ill. 1982) (and cases cited therein).[13]

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11 Criticism of the *Mid-West Paper* court should now be abated in light of the ruling in *Associated General Contractors* to the effect that these factors are of concern in any antitrust case.

12 The *Mid-West Paper* analysis was cited with approval by the post-*Associated General Contractors Merican* court. *See* 713 F.2d at 965 n.15.

13 But neither the Second Circuit nor the District of Columbia Circuit has rejected *Mid-West Paper;* indeed, the Second Circuit embraced its reasoning in *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10,

Nevertheless, I am persuaded that the *Hanover Shoe-Illinois Brick* rationale applies with even more force in the present circumstances (where plaintiffs are only potential customers of non-conspiring competitors) than in the *Mid-West Paper* scenario. With respect to plaintiffs' first claim -- that they could have paid less sooner to the private dock owners had the railroads not retarded the development of self-unloaders -- the plaintiffs ask the Court to engage in an exercise in prophecy. I have not lost sight of the fact that plaintiffs claim they can prove that the private docks did charge less than the railroads when they finally began to avail themselves of the self-unloaders. Nevertheless, had the railroads not interfered, when would the private docks have begun to handle the self-unloaders? Moreover, even if a date could be pinpointed with reasonable accuracy, there is no assurance that the rate charged would be the rates alluded to by plaintiffs. As the *Mid-West Paper* court observed, quoting *Hanover Shoe*, "[a] wide range of factors influence a company's pricing policies." 596 F.2d at 584 (quoting 392 U.S. at 492). This is precisely the sort of complex apportionment of damages which the Supreme Court has warned must be avoided. Furthermore, there exist in this litigation two identifiable classes which are actively pursuing their antitrust remedies against the defendants -- the self-unloader manufacturer, Litton, and the non-railroad dock owners, Pinney and Erie-Western.

I also note my firm belief that these damages are actually claims for overcharge in other clothing.[14] Although plaintiffs claim to be seeking recovery for "lost savings," this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices; while this brings

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14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). Hence, I perceive no problem with alluding to it here. *See* n.7 *supra*.

[14] The tortured nature of the description of the surviving claims is probably in direct proportion to the tenuousness of their causation. In any event, I need not rule on this factor in view of the findings expressed above.

plaintiffs out from under the constraints of *Illinois Brick* (*i.e.*, they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*.[15]

I need not repeat the above analysis with respect to plaintiffs' claim for denied savings on truck hauling because of defendants' conspiratorial and monopolistic behavior; it is the same. I will only add that five trucking concerns are currently pursuing their antitrust remedies against the defendants in this MDL.

All of plaintiffs' damage claims must therefore be dismissed. But plaintiffs will be granted leave to amend their damage claims in accordance with this Memorandum, if it is possible for them to do so. *See Square D*, slip op. at 3248-49 (quoted at p. 12 *supra*).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF

Neither *Keogh* nor the antitrust standing restrictions that have grown out of § 4 affect plaintiffs' ability to maintain actions for injunctive relief (although, curiously, no one has addressed this issue). *See, e.g., Square D*, slip op. at 3280-81; *Weiss v. York Hospital*, 745 F.2d 786, 806-07 (3d Cir. 1984). The only possible complication with respect to this issue is whether the discretionary doctrine of primary jurisdiction

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[15] No matter which view is taken of these claims, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which plaintiffs advance in support of their position, is inapposite. In *McCready*, plaintiff challenged Blue Cross' policy of refusing to reimburse subscribers for fees paid to psychologists for psychotherapy, while at the same time reimbursing such fees when paid to psychiatrists. The Court noted at the outset that the *Illinois Brick* rationale did not apply since there was no risk of duplicative recovery and nothing speculative about the damages (precisely equal to McCready's out-of-pocket expenses). Moreover, the court observed that McCready's injury was not remote, since "it was a necessary step in effecting the ends of the alleged conspiracy." *Id.* at 479. *McCready* is readily distinguishable from the present litigation since here the indirect damages are clearly speculative and since the savings allegedly denied the plaintiffs did not constitute a "necessary step" in the effectuation of the conspiracy -- they are consequential. And I note, parenthetically, that *McCready* cannot be construed to impinge on the holding of the later-decided *Associated General Contractors*, *supra*.

requires that the actions be stayed pending referral to the ICC. In my view, neither stay nor referral is required.

The policy underlying primary agency jurisdiction is to avoid conflict between the roles of court and agency, and to utilize special agency expertise while conserving the resources of the court. In these actions, plaintiffs seek a finding that defendants' conduct violated antitrust laws and an injunction ordering an end to that behavior and barring defendants from resorting to such illegal combinations in the future. The ICC does not have the power to issue such an injunction. *See Georgia*, 324 U.S. at 454-55, *cited in Square D*, slip op. at 3281. Moreover, there are no underlying facts to be established that could best be sifted by the ICC; the issue here is not whether the railroads conformed to a rate agreement, but whether they engaged in a broad-based conspiracy. As a panel of the District of Columbia Circuit noted in the criminal adjunct to this civil litigation:

> [Reed-Bulwinkle] immunity reaches only those actions factually taken "in conformity with" the rate agreement and the terms and conditions laid down by the ICC. It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimate illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau.

United States v. Bessemer and Lake Erie R.R. Co., 717 F.2d 593, 600 (D.C. Cir. 1983).

In view of this, I perceive no reason why the matter, now devoid of all rate-based damage claims, should be referred to the ICC; plaintiffs may proceed with their claims for injunctive relief.[16]

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[16] Although, as I noted above, neither Sharon nor National specifically requested injunctive relief, they did include catch-all requests and predicated the court's jurisdiction, *inter alia*, on 15 U.S.C. § 26 (§ 16 of Clayton Act) which addresses injunctive relief. Hence, their complaints will be construed to include such claims.

III. DISTRICT OF COLUMBIA CLAIMS

Plaintiffs Jones & Laughlin, National, and Wheeling-Pittsburgh also charge defendants with violations of the antitrust laws of the District of Columbia. *See* D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508. Defendants assert that these pendent claims must be dismissed since (1) the D.C. Code must be construed in a manner consistent with federal law (which, in light of the conclusions expressed above, would leave standing plaintiffs' injunction claims); (2) none of the trade or commerce alleged to have been restrained is within the District of Columbia; and (3) application of the D.C. Code to these cases would violate the Commerce Clause of the U.S. Constitution.

In my view, defendants' second argument is dispositive; in order to obtain relief under District of Columbia law, plaintiffs must allege that defendants' conduct restrained trade in the District. That law provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, all or any part of which is within the District of Columbia, is declared to be illegal.

D.C. Code Ann. § 28-4502. Section 28-4503 provides:

> It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

In my view, the above-quoted language, read together and individually,[17] clearly requires that, before the alleged

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[17] Admittedly, a strained reading of § 28-4501 could lead one to conclude that any conspiracy, etc., any part of which occurs in the District, which has as its effect the restraint of trade anywhere (in or out of the District), is illegal. But the language of the next section counsels that such an interpretation would be unwise; for various reasons of grammatical immutability, it clearly demonstrates that the phrase "all or

offensive conduct can rise to the level of an antitrust violation, it must restrain trade or commerce in the District of Columbia.

In so construing the statutes to require local effect as a jurisdictional prerequisite, I do nothing unusual. I note first that the stated purpose of the law is "to promote the unhampered freedom of commerce and industry throughout the District of Columbia by prohibiting restraints of trade and monopolistic practices." D.C. Code Ann. § 28-4501(b). Clearly, the concern is with local trade.

Second, this chapter of the Code also provides that

> [i]t is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.

Id. § 28-4515. Section 1 of the Sherman Act is a comparable antitrust statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . ." (emphasis added). Federal courts routinely construe the emphasized language as a jurisdictional prerequisite which must be pleaded. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

In this regard, plaintiffs' complaints are lacking. In their complaints, they allege that all of the defendants reside, are found, transact business, or have agents in the District of Columbia. This allegation may suffice for Sherman Act venue purposes,[18] but clearly does not support plaintiffs'

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any part of which is within the District of Columbia" is meant to modify "trade or commerce," and not "contract, combination . . . or conspiracy." *See also* the following discussion in the text on the chapter's purpose and proposed rules of construction.

[18] In so stating, I express no opinion on the motions of Norfolk and Western Railway to dismiss the *Jones & Laughlin* and *Wheeling-Pittsburgh*

claims for breach of the substantive law of the District of Columbia. In further support of venue in the District, Jones & Laughlin and Wheeling-Pittsburgh (but not National) do allege that "[c]ertain of the unlawful acts alleged herein were performed or had effects within the District of Columbia." Complaints of Jones & Laughlin and Wheeling-Pittsburgh, ¶ 2 (emphasis added). But in those portions of their complaints entitled "Trade and Commerce", these plaintiffs (and National) state only that "[t]he violations of law alleged herein occurred in and substantially and adversely affected interstate and foreign commerce." *Id.* at ¶ 14; *see also* complaint of *National*, ¶ 9.

National thus makes no allegation of restraint of trade in the District of Columbia, while the allegations of Jones & Laughlin and Wheeling-Pittsburgh in that regard are, at best, ambiguous. In response to the present motions to dismiss, the latter argue only that they have "alleged a conspiracy which took place, at last [sic] in part, within the District of Columbia."[19] Brief of Jones & Laughlin at 76 (emphasis added). Curiously, in response to defendants' square challenge on the issue, plaintiffs do not even allude to the "effects" language contained in the venue allegations of their complaints.

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actions for lack of venue. That motion will be addressed in a subsequent Memorandum and Order.

[19] Jones & Laughlin points out in its summary of facts that in the companion criminal case, it was established that two overt acts evidencing the conspiracy occurred in the District of Columbia: (1) the filing of tariffs with the ICC, and (2) a meeting of the conspirators on July 6, 1976, to discuss trucking competition. Summary at 30. Even assuming that I could properly take note of these "facts", plaintiffs' claims would still be deficient, since, in my view, the fact that a part of the conspiracy occurred in the District of Columbia (while perhaps sufficient to establish venue, *but see* n.18 *supra*) is in itself insufficient to state a claim under District law. *See* n.17 *supra*.

Hence, I conclude that none of the three plaintiffs has properly pleaded its District of Columbia claims. Those claims will therefore be dismissed, but with leave to amend.

An appropriate Order follows.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

ORDER NO. 4

AND NOW, this 5th day of June, 1985, in consideration of the motions of defendants Chesapeake & Ohio Railway Co., Baltimore & Ohio Railroad Co., Norfolk & Western Railway Co., Norfolk Southern Corp., Pittsburgh & Lake Erie Railroad Co., Bessemer & Lake Erie Railroad Co., Consolidated Rail Corp., and CSX Corp. to Dismiss the above-captioned actions or for a Stay Pending Reference of Certain Issues to the ICC, and the responses and replies thereto, it is ORDERED:

1. Defendants' Motions are hereby GRANTED with respect to plaintiffs' claim for damages, costs, and attorneys' fees. Said claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

2. Defendants' motions are hereby DENIED with respect to plaintiffs' claims for injunctive relief.

3. Defendants' motions are GRANTED with respect to the claims of plaintiffs' Jones & Laughlin, Wheeling-Pittsburgh and National for relief pursuant to the District of Columbia Code. Said claims are DISMISSED without prejudice. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

/s/ John P. Fullam
J.

ENTERED: 6-6-85

CLERK OF THE COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2135
REPUBLIC STEEL CORP. v. PENN CENTRAL CORP.	:	CIVIL ACTION NO. 84-2079
NATIONAL STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2138
SHARON STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-5562

MEMORANDUM AND PRETRIAL ORDER NO. 11

FULLAM, Ch. J. — FEBRUARY 12, 1987

In Pretrial Order No. 4 for this multidistrict litigation, I dismissed plaintiffs' antitrust claims for treble damages, costs, and attorneys' fees. The dismissals were without prejudice, however, and plaintiffs were allowed to file amended complaints. This they did, prompting defendants again to move for dismissal. The renewed motion will be granted in part and denied in part.

I.

Pretrial Order No. 4 details the background of this litigation. Allegations relevant to the present motion, presumed true, are as follows:

Plaintiffs are steel companies that, from the early 1950s through the early 1980s, hired transport for ore from iron mines in Michigan, Minnesota, and Canada, to mills in Pennsylvania and Ohio. The ore traveled overland and aboard ships from the mines to docks on lower Lake Erie, and again overland to the mills.

Through the early 1950s, ore left the mines in a mud-like form containing a relatively low concentration of iron. This raw material crossed the Great Lakes on ships that required special dock unloading equipment. The ships were owned and operated by companies whose conduct is not here being challenged. However, on lower Lake Erie most docks were controlled by defendants and, in Pennsylvania and Ohio, defendants also provided rail facilities used by plaintiffs. To supply these services, defendants invested in equipment to unload and carry the ore in this form.

By the mid-1950s, mines began preparing ore for shipment by processing it into concentrated pellets of iron. This enabled development of cheaper transport services.

Specifically, the ore could be carried in self-unloading ships that obviated much of the old dock equipment and, for some inland routes, could be carried more efficiently by trucks than by trains. Whenever introduced, these services would have saved plaintiffs money.

Recognizing the prospect of owning obsolete equipment in markets ripe for picking by competitors, defendants conspired to preserve (or increase) their profit margins. In concert, they fixed prices for dock and rail services that exceeded the amounts chargeable in fairly competitive markets. The set prices were protected by coordinated action to frustrate use of self-unloaders for lake transport, provision of dock services by independent operators, and truck carriage of ore.

The protective strategy capitalized on defendants' dominance of the market for dock services on the lower Lake Erie shore. At the docks they controlled, defendants sometimes refused to permit self-unloaders to discharge cargo and sometimes refused to let trucks pick up ore. When self-unloaders and trucks could gain access to the docks, defendants imposed non-cost-based charges that significantly reduced or eliminated plaintiffs' economic advantages gained with the new technologies. Moreover, defendants blocked some would-be competitors from buying sites where new docks could be built and, where the blocking strategy failed, interfered with the non-conspirators' construction and operation plans; defendants also discouraged investment in self-unloaders by lake transporters. Thus, for many years defendants postponed full-scale implementation of a new transport system whereby pelletized ore could be shipped on self-unloaders, modern docks, and trucks, perpetuating a more costly system of shipping by outdated vessels, wasteful docks, and trains.

II.

These facts, if true, would demonstrate violations of the Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2. They allegedly caused treble-able damages that plaintiffs, at pages 3-4 of their brief opposing dismissal, sort into seven categories (¶¶ 1-7). These claims will be assessed in four groups.

A.

All plaintiffs identify harms based on hypothetically lower prices that, but for the conspiracy, defendants would have charged for dock and rail services. Generally, plaintiffs claim "damages directly resulting from defendants' fixing the charges paid by plaintiffs for unloading, transshipment and inland transportation services at artificially high and non-competitive levels." ¶ 7. Particularly, they claim "damages directly resulting from charges by defendants for unloading and transshipment services never rendered to plaintiffs." ¶ 5. Under either theory, recovery would require estimation of what charges would have been accepted by the Interstate Commerce Commission (ICC).

Such an inquiry is forbidden by *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), *reaffirmed in Square D Company v. Niagara Frontier Tariff Rate Bureau, Inc.*, 106 S. Ct. 1922 (1986). "In *Keogh*, the Court held that an action for damages consisting of the difference between rates set illegally and the rates that would have been set absent a conspiracy was barred because plaintiff's sole remedy was an action before the ICC." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985); *see also Minsky v. Auto Driveway Co.*, 757 F.2d 718, 720 (7th Cir. 1984) ("A customer of a carrier, who was charged the filed rate, cannot maintain an antitrust action against the carrier for an alleged conspiracy in setting the rate.") (emphasis original). *Keogh* applies whether filed tariffs "result from a combination to file higher tariffs or from a combination to prevent others from taking

independent action to file lower tariffs," *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985) (Friendly, J.), *aff'd*, 106 S. Ct. 1922 (1986), and applies even when defendant carriers cover up their conspiracy by failing to follow procedures specified in an agreement with the ICC, *In re Wheat Rail Freight Rate*, 759 F.2d 1305, 1313-16 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2275 (1986). Under this precedent, I will dismiss these claims.

B.

Concerning the market for lake transport services, plaintiffs make two sets of claims. National Steel Corporation, with an in-house fleet, claims "damages directly resulting from defendants' delay and suppression of National's use of self-unloader technology . . . ." ¶ 2. The other plaintiffs, having hired lake transport services, claim "damages directly resulting from defendants' foreclosure of self-unloading vessels . . ." from the lake transporters' fleets. ¶ 1. These claims depend on proof that plaintiffs would have realized savings whenever lake transporters began using self-unloaders.

1.

By quantifying the costs saved by lake transporters using self-unloaders, and from evidence of the lake transport industry rates of return, plaintiffs other than National offer to prove what prices they would have been charged for lake transport of ore. Such an endeavor might make sense in another context, but not to justify treble damages under the federal antitrust laws.

Notwithstanding the broad language in 15 U.S.C. § 15, Congress clearly intended to limit the type of harms entitling victims to treble damages. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-35 (1983). Although "the infinite variety of claims that may arise" has prevented

announcement of "a black-letter rule that will dictate the result in every case," the Supreme Court instructs that "previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 536-37. The case most relevant for the present purposes is *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In *Illinois Brick*, the Court "held that treble damages could not be recovered be indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy." *Associated General Contractors*, 459 U.S. at 544. To hold otherwise, the Court explained, would have created great unavoidable difficulties: if indirect purchasers could recover while suppliers' claims against defendants were not correspondingly reduced, antitrust violators would be exposed to hextuple damages, far more than Congress envisioned and engendering complicated evidentiary efforts by indirect purchasers to prove how, precisely, the increased price charged to suppliers generated in increased prices charged by suppliers, 431 U.S. at 730-32; if courts attempted to apportion the harm suffered between suppliers and indirect purchasers, the pressure to adjudicate in one action the claims of all persons affected in some way by the conspiracy would create massive lawsuits with concomitant complexity, *id.* at 731 n.11 & 737-45. By preventing indirect purchasers from suing and by reaffirming the rule that defendants could not argue that indirect rather than direct purchasers were injured by antitrust violations, *id.* at 736-37 (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)), the Court minimized the potential for complexity and gave one class of plaintiffs the full statutory incentive to sue, thus maximizing the chance that the most directly injured party would enforce the antitrust laws.

The problems recognized in *Illinois Brick* are not limited to circumstances where defendants conspire to effect above-market fixed prices on sales to providers of goods or services to indirect purchasers. Therefore, in each case involving

purchasers from providers of goods or services whose prices might be elevated because of defendants' antitrust violations, as here, judges must consider the policies underlying *Illinois Brick* to decide if lawsuits by the indirect purchasers could enable improper duplicative recovery or massive and complex litigation. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 & n.20 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). In general, under the "mutuality" principle, an indirect purchaser may sue if and only if the antitrust defendant may argue for a corresponding reduction in the provider's damages. *Illinois Brick*, 431 U.S. at 728.

Justifications for such actions constitute passing-on theories. "Absent unusual circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense." *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979) (Wisdom, J.), *cert. denied*, 449 U.S. 905 (1980). Unusual circumstances have been recognized when the amount passed on is indisputably determinable, as with cost-plus contracts, and when the provider is either owned or controlled by a plaintiff or functionally united with a defendant, as a division or co-conspirator. *E.g.*, *Illinois Brick*, 431 U.S. at 735-36 & n.16; *see also von Kalinowsky, 16G Business Organizations: Antitrust Laws and Trade Regulations* § 101.02[3] n.35 (Nov. 1986 *Supp.*) (collecting cases). Neither exception is pled in this case.

Instead, plaintiffs' claims for damages in the lake transport market closely resemble the claim made in *Hanover Shoe*. There, defendants attempted to monopolize a market by leasing, but refusing to sell, certain advanced technology. 392 U.S. at 483-84. This supported an action by would-be buyers of the machines, who could have reduced their production costs. *Id.* at 487. Defendants unsuccessfully urged the Supreme Court to approve a passing-on theory to the effect that plaintiffs were not damaged; in view of the prices then charged their customers (indirect purchasers). *Id.* at 487-94. Under the mutuality principle, those indirect

purchasers could not have sued defendants for potential reduced shoe prices that, but for the conspiracy, plaintiffs would have set. In the present context, by analogy, I conclude that the steel company plaintiffs other than National cannot succeed on this claim; damages related to the lake transport market should be pursued by more directly injured plaintiffs, the transporters that could have reduced their costs but for the conspiracy.

In response, plaintiffs suggest that a simple proceeding could allocate damages between lake transporters and the mills. They propose to prove the price that, but for defendants' conspiracy, lake transporters would have charged. The Supreme Court, however, has anticipated difficulties in such an endeavor: "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, . . . for example), he would have chosen a different price." *Id.* at 492-93. Accordingly, I reject plaintiffs' suggestion and will dismiss claims based on potential savings in the lake transport market by plaintiffs other than National.

2.

National's claim for damages in the lake transport market depends on evidence that defendants' actions delayed introduction of the cheaper self-unloader technology by National; it does not implicate any hired lake transporters. No *Keogh* problem arises because damages will not be measured by reference to any tariffs filed with the ICC and, allegedly, the damages in significant part flow from defendants' illegal activities other than price-fixing. *See also Square D*, 106 S. Ct. at 1925 (acknowledging the Second Circuit's decision that plaintiffs could amend their complaints to state possible claims for damages not arising from the filed tariffs"); *Barnes*, 759 F.2d at 679 (*Keogh*

inapplicable to antitrust violation interfering with markets tangential to those where defendants do business). Further, National's claim should not be barred by the rule against unduly speculative actions, because the causal connection is reasonably alleged, the injury is of a type Congress intended to prevent, no potential plaintiff suffers from this injury more directly, and no other plaintiff could pursue such recovery. *See Associated General Contractors*, 459 U.S. at 536-45.

Defendants respond with two contrary arguments. First, they suggest that National's claim should be dismissed because it creates potential for duplicative recovery. This might occur because National's claim depends on proof of its costs to buy self-unloaders, and Litton Industries also may be claiming damages for lost sales of such vessels (or parts thereof) to National, *see Litton Industries, Inc. v. Penn Central Corp.*, No. C81-372 (N.D. Ohio). Given separate trials, it is argued, the price of sale proven by Litton may, to defendants' detriment, exceed the cost of purchase proven by National.

Assuming *arguendo* that Litton can claim treble damages for lost sales to National, the potential for duplicative recovery is not impermissible. Defendants' antitrust violation affects the price of self-unloaders only to the extent that economies of scale come into play. This uncertainty cannot be of the type feared by the Supreme Court, because otherwise all companies losing business due to antitrust activity would face a claim-barring uncertainty in the cost of their inputs for production. This shows that defendants' first argument proves too much. I reject it.

Defendants' second, related argument is that too much speculation would attend any attempt to prove how rapidly the self-unloader technology would have developed. I disagree.

It cannot be denied that the technology did develop, so the only question is how much earlier the technology would

have been introduced, absent the alleged antitrust violations. Although this involves some uncertainty, if National can prove that defendants did delay use of self-unloaders, it proves a real harm; the magnitude of harm being made uncertain by defendants' acts, and National, as a buyer of the product, being a party well placed to develop the facts, the claim is not too speculative. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (recognizing "practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market"). Accordingly, I will not dismiss National's claim for excessive costs incurred in lake transport.

C.

Republic Steel Corporation claims "damages directly resulting from the delay in the construction and use of Republic's own dock facilities for the unloading and transshipment of iron ore." ¶ 4. These facilities allegedly would have served self-unloaders at a net cost below the prices defendants charged, but were delayed both by the delay in building a self-unloader fleet and by defendants' blocking strategies involving docks and inland transport.

This claim provokes a two-pronged response by defendants. First, citing *Associated General Contractors*, defendants argue that the claim entails too much speculation to prosecute. However, any uncertainties relate to the measurement, not the direct causation of damages, and if defendants did violate the antitrust laws then they created the uncertainties. For the reasons I rejected the speculation defense with respect to National's individual claim, I reject the speculation defense with respect to Republic's individual claim. *See also Pinney Dock & Transport Co. v. Penn Central Corp.*, 600 F.Supp. 859, 882-85 (N.D. Ohio 1983) (allowing claims by a non-railroad dock that allegedly lost business due to defendants' conspiracy).

Defendants also argue that *Keogh* bars Republic's claim. This would require an untenably broad reading of *Keogh*, to the effect that if a party pays for services under a tariff filed with the ICC, then the party never can claim that antitrust violations prevented use of a cheaper but otherwise equivalent service.

Keogh stands for the proposition that legislation creating the ICC's regulatory authority causes an implied repeal of the antitrust laws "only . . . in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 & n.29 (1963); *see also United States v. Radio Corp. of America*, 358 U.S. 334, 347-48 (1959) (*Keogh* "emphasized the need for administrative uniformity and uniform rates"). Such plain repugnancy exists with respect to the determination of rates that defendants would have charged, but not with respect to costs that Republic would have incurred in operating a dock. Indeed, in this claim Republic makes no assertion that defendants' dock tariffs were illegal, but only for damages caused by actions outside the ICC's exclusive jurisdiction, those constituting an illegal blockade of what, in effect, would have been a competitor dock.

Competitor docks retain power to sue defendants in this case, *Keogh* notwithstanding. *Pinney Dock*, 600 F.Supp. at 878-82; *see Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). These docks will attempt to establish what, but for the conspiracy, would have been their costs, prices, and volume of business. Republic similarly deserves the chance to prove what would have been its costs and volume of ore off-loaded, from which its damages may be calculated. Accordingly, I will not dismiss Republic's claim for excessive expenditures to obtain dock services.

D.

All plaintiffs join in raising two final claims. They seek "damages directly resulting from defendants' elimination of competitive non-railroad dock facilities from the market of providing unloading and transshipment services to plaintiffs." ¶ 3. They also seek "damages directly resulting from defendants' elimination of competition from trucking in the market of inland transportation services to plaintiffs." ¶ 6. These claims both depend on proof that the conspiracy delayed competitors' entry into defendants' markets (for dock services and inland transport) and that the competitors' prices (for docks tailored to self-unloaders and for trucks) would have undercut defendants' prices, with damages to be calculated by multiplying the difference between defendants' actual and the competitors' probable prices times the volume of ore shifted from defendants' carriers to the competitors' carriers.

In response, defendants argue that *Keogh* and *Associated General Contractors* preclude plaintiffs' claims. I disagree.

1.

With respect to *Keogh* analysis shows that these claims resemble Republic's individual claim (discussed in II.C). Plaintiffs need not prove what prices, but for the conspiracy, defendants would have charged; plaintiffs need prove only that, in the context of tariffs that I must accept as legitimate, defendants' exclusionary activities and other antitrust violations slowed penetration of the relevant markets by defendants' competitors. Thus, plaintiffs' damages do not depend on proof of price-fixing by defendants, which *Keogh* would bar, but on proof that defendants conspired to exclude low-cost competitors from the market, which does not implicate the ICC's exclusive jurisdiction and therefore is not barred by *Keogh*. In short, as Judge Friendly has explained, "[a] shipper may recover damages if it can show that carriers caused injury to the shipper's business or

property other than by higher tariffs . . . . " *Square D*, 760 F.2d at 1365; *cf. Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 820-21 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (notwithstanding defendants' non-liability for monopolistic pricing, plaintiffs may claim in court that tying arrangements violated antitrust laws). Accordingly, I will not rely on *Keogh* to dismiss these claims.

2.

With respect to *Associated General Contractors*, analysis requires distinguishing two possible components of these claims. To the extent, if any, that plaintiffs purchased dock or inland transport services from non-conspiring transport companies, I will dismiss plaintiffs claims under *Illinois Brick*. *See supra* II.B.1. However, to the extent that plaintiffs purchased services from defendants, I will not dismiss the claims.

Plaintiffs straightforwardly allege that, but for the conspiracy, competitors would have provided substitute dock and inland transport at prices below those charged by defendants. As defendants' customers, plaintiffs allege direct injury, not injury passed through an intermediate provider. Thus plaintiffs claim to suffer one of the greatest antitrust harms, an inability to seek lower prices from competitors destroyed or delayed by an illegal conspiracy.

Further, where conspirators act to dissuade potential competitors even from trying to enter a market, as is alleged in this case, the conspirators reduce (sometimes to zero) the number of competitor plaintiffs with standing to sue. Such standing requires proof of preparation and intent to enter the market. *See Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F.Supp. 440, 443-44 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961); *cert. denied*, 369 U.S. 839 (1962). In general, this preparation may not be undertaken by companies well suited to compete, because such efforts would not appear worthwhile, if conspirators impose

sufficient barriers; in particular in this case, few trucking companies have filed suit. To the extent that potential market entrants eschewed substantial preparations, only defendants' customers are in a position to prosecute antitrust actions.

Finally, often in such circumstances, as here, defendants' customers have the most information and greatest incentive to start litigation. Uncertainties in the measurement of damages will remain, but these will be due to defendants' actions and should not impose an absolute barrier to recovery by defendants' customers.

Defendants argue that the potential for excessive speculation and duplicative recovery should preclude these claims. With respect to the inland transport claims, however, it cannot be denied that numerous trucking companies did business in Ohio and Pennsylvania, so that even if few truckers substantially prepared to enter the market, a market price for truck carriage will be determinable. Likewise, the prices for dock services may be estimated reasonably accurately in various ways (such as by reference to docks servicing self-unloaders in other markets or by reference to the prices charged by Pinney and other non-railroad docks when these docks did open on lower Lake Erie). A similar level of uncertainty did not stop the Supreme Court from affirming a jury verdict of damages in *Thomsen v. Cayser*, 243 U.S. 66 (1917), an early case where ocean transporters illegally prevented competitors from serving shippers.

Given this relative lack of uncertainty surrounding the prices that plaintiffs would have paid for dock and inland transport, there exists little potential for duplicative recovery. This potential should not preclude these claims. *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1499-1500 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1513 (1986); *see also Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1087 (6th Cir. 1983).

Similar potentials for speculation and duplicative recovery were present in *Pinney Dock*, 600 F.Supp. at 882-85, but did not bar plaintiff's claims. Likewise, I will not rely on *Associated General Contractors* to dismiss these claims.

III.

With respect to the four surviving sets of plaintiffs' claims, all parties should remain aware that denial of a motion to dismiss does not preclude a grant of summary judgment for defendants, after completion of discovery. An Order follows.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

PRETRIAL ORDER NO. 11

AND NOW, this 12th day of February, 1987, it is ORDERED that defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's claims for damages will be limited as follows:

1. Jones & Laughlin Steel, Inc. and Republic Steel Corporation shall not recover the damages claimed in their Consolidated Amended Complaint ¶ 43 (a, f, g, & h).

2. National Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 33 (a, d, e, f, & h).

3. Sharon Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 34 (a, c, e, f, & g).

4. Wheeling-Pittsburgh Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 38 (a, d, e, & f).

/s/John P. Fullam
Ch. J.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE MDL NO. 587
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER NO. 49

FULLAM, Ch. J. APRIL 19, 1989

SUMMARY OF CONCLUSIONS AND RULINGS ON PENDING MOTIONS FOR SUMMARY JUDGMENT

Trial of these 10 MDL cases is scheduled for early May 1989. The parties have recently completed briefing their numerous motions for summary judgment. It is essential that these motions be decided, as an aid to trial preparation; but time-pressures preclude completion of a full-blown opinion. It is therefore appropriate to set forth my rulings without extended discussion at this time:

For the reasons discussed previously (see Memorandum and Order Nos. 4 and 11), I have concluded that *Keogh* precludes assertion of rate-related claims by shippers. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922). The recent decision of the Sixth Circuit Court of Appeals in *Pinney Dock v. Penn Central Corp.*, 838 F.2d 1444 (6th Cir. 1988) concluded that *Keogh* also rules out rate-related claims

by competitors. I have concluded, however (contrary to a view suggested by my earlier memoranda in this case), that it is appropriate for this court to apply Third Circuit law in all of these MDL cases, essentially for the reasons asserted in *In re Korean Airlines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987). The Third Circuit has intimated a similar view, where federal law is involved. *See In re Pittsburgh & Lake Erie R.R. Co. Securities and Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976).

Applying Third Circuit law, *see Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114 (3d Cir. 1979), I conclude that *Keogh* immunity does not extend to rate-related claims brought by a regulated defendant's competitors.

On the other hand, many of the claims asserted in this case, whether rate-related or not, and whether asserted by competitors or customers, are barred either because the defendants' alleged conspiratorial activities benefitted, rather than harmed, a given plaintiff, or because barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers), or *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (no antitrust standing).

Defendants' statute-of-limitation arguments are accepted in part and rejected in part: I conclude that the steel company plaintiffs are precluded from recovering damages sustained more than four years before their respective complaints in this action were filed. Not only did they plainly have knowledge of facts which should reasonably have made them aware of a basis for asserting the very claims now being asserted, but it is also clear that they were specifically being urged to support an antitrust suit by Pinney Dock -- at least as early as 1972, and more than four years before the criminal indictment. The indictment did not revive claims theretofore barred. *Cf. Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867 (9th Cir.), *cert. denied*, 439 U.S. 829 (1978).

With respect to the Reaney plaintiffs and Erie-Western Port Authority, the record is less clear. Because there may be a factual basis for tolling the statute as to these plaintiffs, the limitations issues in their cases should be decided at trial.

I have concluded that the record is insufficiently clear to permit summary disposition of defendants' argument that none of the Reaney plaintiffs has standing to pursue these claims.

Finally, I have concluded that the plaintiffs have no evidence sufficient to impose liability on Penn Central Corporation for any of the claims asserted in the litigation.

In view of the conclusions summarized above, I now register the following rulings on the pending motions for summary judgment.

I. CLAIMS OF THE REANEY PLAINTIFFS

A. Defendants' motions for summary judgment are granted with respect to claims by these plaintiffs concerning excessive charges for self-unloaders at railroad docks, excessive handling charges from railroad docks, and refusal to sell or lease property to third parties for dock use.

B. In all other respects, defendants' motions for summary judgment are denied as to these plaintiffs.

II. PLAINTIFF-ERIE WESTERN PORT AUTHORITY

Defendants' motions for summary judgment are denied with respect to plaintiffs' claims of refusal to sell an ore dock without restrictions. In all other respects, the rulings set forth above with respect to the Reaney plaintiffs shall apply also to this plaintiff.

III. TRUCKING COMPANY PLAINTIFFS

A. Defendants' motions for summary judgment are granted with respect to the claims of these plaintiffs relating to the alleged suppression of self-unloader technology, denial of line-haul rates, and suppression of (refusal to sell to) private docks.

B. In all other respect, defendants' motions for summary judgment are denied, as to these plaintiffs.

IV. CLAIMS OF THE STEEL COMPANY PLAINTIFFS

A. All rate-related claims asserted by the steel company plaintiffs are dismissed. This includes claims that, but for the alleged conspiracy, these plaintiffs could have obtained lower land-transportation costs, whether it be from the defendants or truckers. All claims of these plaintiffs for damages sustained more than four years before their respective complaints were filed in this litigation are dismissed.

B. Defendants' motions for summary judgment with respect to the steel company plaintiffs' claims relating to economic losses directly sustained by reason of suppression/delay of self-unloader technology/availability are denied, without prejudice to reconsideration at an early stage of the trial, on the basis of specific offers of proof.

V. CLAIMS AGAINST PENN CENTRAL CORPORATION

All claims against the defendant Penn Central Corporation are dismissed.

VI. MISCELLANEOUS

All pending motions not covered by the foregoing rulings are denied.

/s/John P. Fullam
Ch. J.

APPENDIX F

MDL 587

QUESTIONS TO BE ANSWERED BY THE JURY

SHERMAN ACT (§ 1) CONSPIRACY IN RESTRAINT OF TRADE

1. Did the Bessemer & Lake Erie Railroad participate in an agreement, combination or conspiracy in restraint of trade in violation of § 1 of the Sherman Act.

Yes √ No ___

SHERMAN ACT (§ 2): CONSPIRACY TO MONOPOLIZE

2. Did the Bessemer & Lake Erie Railroad participate in a combination or conspiracy to monopolize in violation of § 2 of the Sherman Act?

Yes √ No ___

If you answered "Yes" to either question 1 or 2, answer questions 3 and 4. If you answered "No" to questions 1 and 2, answer question 5.

ACT IN FURTHERANCE

3. Did any participant in the agreement, combination or conspiracy take any act in furtherance of the agreement, combination or conspiracy after October 13, 1977?

Yes √ No ___

4. Did the Bessemer & Lake Erie Railroad withdraw from the conspiracy before October 13, 1977?

Yes __ No √

(a) If so, when?

_____

OHIO VALENTINE ACT

5. Did the Bessemer & Lake Erie Railroad participate in a conspiracy which had the purpose of restricting trade or preventing competition in the transportation of iron ore through or in the State of Ohio in violation of the Ohio Valentine Act?

Yes √ No __

CLAIMS OF REPUBLIC STEEL CORPORATION

6. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Republic Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

(c) inability to fully use trucks to move iron ore to its Warren and Youngstown, Ohio mills?

Yes ___ No √

CLAIMS OF JONES & LAUGHLIN STEEL INCORPORATED

7. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Jones & Laughlin Steel Incorporated?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

(c) inability to fully use trucks to move iron ore to its Ohio, mills?

Yes ___ No √

CLAIMS OF WHEELING-PITTSBURGH STEEL CORPORATION

8. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wheeling-Pittsburgh Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

CLAIMS OF NATIONAL STEEL CORPORATION

9. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of National Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

CLAIMS OF SHARON STEEL CORPORATION

10. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Sharon Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the use of self-unloading vessels for the delivery and unloading of iron ore?

Yes √ No ___

(b) foreclosure and/or delay in the use of independent docks to handle iron ore?

Yes √ No ___

(c) foreclosure and a delay in the use of trucks to move iron ore to its Farrell, Pennsylvania, mill?

Yes ___ No √

CLAIMS OF THE REANEY PLAINTIFFS

11. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Reaney?

Yes __ No √

If Yes, did injury result from:

(a) acts to prevent the Reaneys from engaging in an iron ore business at Grand River?

Yes __ No √

(b) acts to prevent the Reaneys from engaging in an iron ore business at the Minnesota slip?

Yes __ No √

CLAIMS OF ERIE-WESTERN PENNSYLVANIA

PORT AUTHORITY AND CODAN CORPORATION

12. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of the Erie plaintiffs?

Yes √ No ___

If Yes, did injury result from:

(a) acts to prevent the Erie from subleasing or purchasing the Erie ore dock?

Yes √ No ___

(b) acts to prevent Erie from having competitive iron ore rail rates at the Erie ore dock?

Yes √ No ___

CLAIMS OF C.D. AMBROSIA
TRUCKING COMPANY

13. Was the unlawful conspiracy a material cause of any injury to the business or property of the C.D. Ambrosia Trucking Company?

Yes √ No ___

If "Yes," did injury result from:

(a) acts to remove hopper cars from steel mills or otherwise cramp and impede truck transportation of iron ore?

Yes ___ No √

(b) acts to discourage or prevent truck transportation of iron ore from railroad-owned docks?

Yes ___ No √

(c) acts to prevent truck transportation of iron ore from Minnesota slip dock by use of a lease restriction prohibiting trucking from that dock?

Yes ___ No √

(d) acts to prevent or delay iron ore handling by private docks that would permit trucking of iron ore?

Yes √ No ___

CLAIM OF TAURO BROTHERS TRUCKING COMPANY

14. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Tauro Brothers?

Yes √ No ___

If Yes, did injury result from:

(a) denial of access to railroad docks to truck iron ore?

Yes ___ No √

(b) foreclosure and/or delay in the utilization of self-unloading vessels to be used to bring iron ore to docks to which truckers were allowed access?

Yes √ No ___

(c) inability of steel mills to fully use private docks, to which trucks were allowed access.

Yes √ No ___

CLAIMS OF THE WILLS COMPANIES

15. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills' dock companies (Toledo World Terminals, Inc., and its predecessors, Consolidated Dock, Inc. and Consolidated Dock & Storage, Inc.)?

Yes √ No ___

If Yes, did any such injury result from:

(a) acts in furtherance of the conspiracy, including the refusal to lease dock property without restrictions, to prevent Wills from engaging in an iron ore business at the Minnesota slip (Ashtabula)?

Yes ___ No √

(b) acts in furtherance of the conspiracy, including the refusal to lease dock property, to prevent Wills from engaging in an iron ore business at Whiskey Island (Cleveland)?

Yes ___ No √

(c) acts in furtherance of the conspiracy, including the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio?

Yes √ No ___

16. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills Trucking, Inc. because it was unable to provide a trucking service in combination with Wills' dock services?

Yes √ No ___

CONCEALMENT

17. Did any participant in the unlawful conspiracy take affirmative acts to conceal the conspiracy, or to conceal any act in furtherance of the conspiracy?

Yes √ No ___

If you answered "Yes" to question 17, answer question 18.

18. Have the following plaintiffs shown that they did not have actual knowledge of the unlawful conspiracy prior to October 14, 1977 and did not have knowledge of facts prior to that time which, through the exercise of due diligence, should have caused them to discover the unlawful conspiracy?

(Answer as to each plaintiff.)

(a) C.D. Ambrosia Trucking Co., Inc.

Yes √ No ___

(b) Erie-Western Pennsylvania Port Authority and Codan Corporation

Yes ___ No √

(c) Reaney Dock Company and David W. Reaney, individually or on behalf of Warford Reaney

Yes √ No

(d) Tauro Brothers Trucking Co.

Yes √ No ___

(e) Wills Trucking Co. and Toledo World Terminal, Inc., including Consolidated Dock and Storage, Inc. and Consolidated Dock, Inc.

Yes √ No ___

19. If you have found that the defendant violated the antitrust laws, state whether each act in furtherance of the agreement, combination or conspiracy was taken in a good faith belief that it was required by ICC regulations.

Yes ___ No √

20. Was defendant's conduct reasonable under the circumstances, including possible justification under the regulatory policies under which defendant operated?

Yes ___ No √

QUESTIONS TO BE ANSWERED BY THE JURY

DAMAGE CLAIMS OF REPUBLIC STEEL CORPORATION

1. State the amount of damages that will fairly and reasonably compensate Republic Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 13,100,000
(ii) Dock Damages	$ 5,300,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 60,600,000
(ii) Dock Damages	$ 8,000,000

DAMAGE CLAIMS OF JONES & LAUGHLIN
STEEL INCORPORATED
(INCLUDING YOUNGSTOWN SHEET &
TUBE COMPANY)

2. State the amount of damages that will fairly and reasonably compensate Jones & Laughlin Steel Incorporated, including Youngstown Sheet & Tube Company, for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 25,900,000
(ii) Dock Damages	$ 6,900,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 39,000,000
(ii) Dock Damages	$ 3,700,000

DAMAGE CLAIMS OF WHEELING-PITTSBURGH STEEL CORPORATION

3. State the amount of damages that will fairly and reasonably compensate Wheeling-Pittsburgh Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 7,100,000
(ii) Dock Damages:	
Material Handling	$ 4,400,000
Demurrage	$ 1,300,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 7,800,000
(ii) Dock Damages:	
Material Handling	$ 5,300,000
Demurrage	$ 1,000,000

DAMAGE CLAIMS OF NATIONAL STEEL CORPORATION

4. State the amount of damages that will fairly and reasonably compensate National Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i)	Material Handling (Dock) Damages	$ 2,200,000
(ii)	Vessel Operating Cost Savings	$ 10,000,000
(iii)	Great Lakes In-Plant Handling Savings	$ 1
(iv)	Investment Cost Savings	$ 10,400,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i)	Material Handling (Dock) Damages	$ 3,400,000
(ii)	Vessel Operating Cost Savings	$ 4,400,000
(iii)	Great Lakes In-Plant Handling Savings	$ 1
(iv)	Investment Cost Savings	$ 6,300,000

DAMAGE CLAIMS OF SHARON STEEL CORPORATION

5. State the amount of damage that will fairly and reasonably compensate Sharon Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the use of self-unloading vessels for the delivery and unloading of iron ore and (ii) foreclosure and/or delay in the use of independent docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Material Handling (Dock) Damages $ 3,700,000

(ii) Self-Unloader Premium Damages $ 1

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Material Handling (Dock) Damages $ 1,400,000

(ii) Self-Unloader Premium Damages $ 1

DAMAGE CLAIMS OF ERIE WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION

6. State the amount of damages that will fairly and reasonably compensate the Erie plaintiffs for injury to their business or property resulting from (i) acts to prevent Erie from subleasing or purchasing the Erie ore dock and (ii) acts to prevent Erie from obtaining competitive iron ore rail rates from the Erie ore dock.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Lost Profit Damages	$ 1,700,000
(ii) Opportunity Cost Damages	$ 1

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Lost Profit Damages	$ 5,000,000
(ii) Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF C. D. AMBROSIA TRUCKING COMPANY

7. State the amount of damages that will fairly and reasonably compensate C. D. Ambrosia Trucking Company for injury to its business or property (during the period January 1, 1965 - December 31, 1979) resulting from acts to prevent or delay iron ore handling by non-railroad docks that would permit trucking of iron ore.

(Answer for each time period and for each category of damages)

(a)	Lost Profit Damages	$ 1,800,000
(b)	Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF TAURO BROTHERS TRUCKING COMPANY

8. State the amount of damages that will fairly and reasonably compensate Tauro Brothers Trucking Company for injury to its business and property resulting from (i) foreclosure and/or delay in the utilization of self-unloading vessels to be used to bring ore to docks to which truckers were allowed access and (ii) inability of steel mills to fully use independent docks to which truckers were allowed access.

(a)	Lost Profit Damages	$ 3,800,000
(b)	Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF THE WILLS COMPANIES

9. State the amount of damages that will fairly and reasonably compensate Wills' dock companies (Toledo World Terminal, Inc. and its predecessor, Consolidated Dock, Inc.) for injury to its business or property resulting from acts in furtherance of the conspiracy, including the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, that prevented Wills from engaging in an iron ore business at Toledo for Armco.

Dock Damages: $ 1

10. State the amount of damages that will fairly and reasonably compensate Wills Trucking, Inc. for injury to its business or property resulting from being deprived of the opportunity to provide a trucking service to Armco in combination with Wills' dock services.

Trucking Damages: $ 1

No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

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QUESTIONS PRESENTED

1. Whether the holding of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), should be expanded to bar antitrust damages for any party—customer or competitor—when: (a) plaintiffs did not challenge the lawfulness of any rate filed with the Interstate Commerce Commission and did not seek any rebate of alleged filed-rate overcharges; (b) damages were not measured by reference to hypothetical regulated railroad rates; (c) the jury was specifically instructed that liability could not be premised on rate-related claims; and (d) the court of appeals "conclude[d] from the evidence produced that . . . plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims."

2. Whether, assuming *Keogh* is expanded to bar such antitrust damage claims by shippers, it should *further* be expanded to bar damages for competitors, where: (a) this Court's decisions and those of the lower courts have consistently declined to apply *Keogh* to competitor claims; (b) the competitor claims do not create the risk of discriminatory rebates that was the concern in *Keogh*, and (c) the competitors' claims are not measured by reference to hypothetical rates that would require Interstate Commerce Commission approval.

3. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), should be extended to bar the antitrust damage claims of the steel company plaintiffs, notwithstanding that the court of appeals in this and a related case held those steel companies to be directly-injured victims of a conspiracy to exclude competition.

RULE 29 STATEMENT

Pursuant to Rule 29.1, there are no parent or subsidiary corporations to be listed.

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BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

Respondents C.D. Ambrosia Trucking Company (Ambrosia), Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), and Tauro Brothers Trucking Company (Tauro) respectfully oppose the petition for certiorari.

STATEMENT

There is nothing "extraordinary" about this antitrust case—except, perhaps, the audacity and scope of the illegal conduct at issue. In a 1989 jury verdict, Petitioner Bessemer & Lake Erie Railroad (B&LE) was held responsible for its leading role in a destructive 25-year

conspiracy that unlawfully monopolized the transportation of iron ore to this nation's steel mills.[1] In a prior criminal case, B&LE pled *nolo contendere* to antitrust charges based on its role in the conspiracy. *See United States v. Bessemer and Lake Erie Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983).

The Third Circuit's judgment in this case does not warrant plenary review. B&LE does not dispute the trial court's finding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy."[2] Nor does B&LE challenge the Third Circuit's holding, agreeing with the D.C. Circuit in the criminal case, that the Interstate Commerce Act afforded the conspirators no antitrust immunity. B&LE neither denies its role in the conspiracy nor questions the fairness of the proceedings that awarded compensation for its effect. B&LE instead asks this Court to immunize its misconduct from treble damages through a sweeping extension of the *Keogh* doctrine. Even with respect to this issue, however, B&LE does not challenge the instructions given the jury. Instead, B&LE seeks to manufacture a need for plenary review by presenting an incomplete and seriously distorted picture of what was decided below.

A. The Facts

Traditionally, iron ore in mud-like form was transported from mines in Michigan, Minnesota and eastern Canada across the Great Lakes on ships known as "bulk-

[1] Although B&LE describes itself as a "small, 200-mile railroad," it was one of the largest carriers of iron ore in the nation during the period in question, and was established for the principal purpose of transporting ore from Lake Erie to the steel mills of Ohio and Pennsylvania.

[2] Appendix to Petition for Certiorari (Pet. App.), 97a (opinion denying motion for judgment notwithstanding the verdict).

ers." On arrival at docks on the south shore of Lake Erie, the ore was unloaded by huge and extremely expensive equipment, including large cranes known as huletts. From the docks, B&LE and other railroads transported the ore to steel mills in Ohio and Pennsylvania.[3] So long as ore remained in mud form, this transportation system was largely insulated from competition because the railroads controlled the huletts needed to unload the "bulker" ships, and the rail lines from the docks to the mills.

In the early 1950s, the advent of "pelletized" ore portended three important changes in ore transportation. First, because pelletized ore could be unloaded with a conveyor belt carried on the ship (rather than huletts on the docks), a larger and more efficient type of vessel—the "self-unloader"—could replace traditional bulkers. Second, because huletts and other heavy equipment were no longer necessary to unload ore, "private docks" not owned by the railroads could compete for iron ore business without facing the entry barrier of prohibitive capital investments. Third, because railroads could not bar private docks from dealing with motor carriers, trucks could compete with railroads for transportation of ore to the mills. Pelletized ore therefore made possible a new transportation system—self-unloaders, private docks, and trucks—that could move ore at a cost far lower than the monopoly rates charged by the railroads.

The railroads' own documents demonstrate their collective determination to squelch this threat to their monop-

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[3] Other railroads, including the New York Central (NYC), the Chesapeake & Ohio Railway Co. (C&O), the Baltimore & Ohio Railroad Company (B&O), the Norfolk & Western Railway Company (N&W), Penn Central Corp., and the Consolidated Rail Corporation (Conrail), also transported ore and were defendants in this case. Defendants other than B&LE settled before trial, or were dismissed from the case.

oly profits. As early as 1956, the railroad conspirators recognized the risk of a "switch in the movement of raw ore from 100% in bulk freighters . . . to substantial self-unloader movements." Court of Appeals Appendix (CA App.) 6460. Concerned that "other shippers may enter the picture and self-unloaders may . . . go to other [nonrailroad] docks," the railroads convened secret meetings at which they concluded that "something must be done to overcome the threat such inexpensive facilities, which could spring up anywhere, are to our established ore facilities and charges." CA App. 6462. Indeed, railroad documents confirm their fear that "the economies involved [would entice] additional public docks in the iron ore trade to compete with the railroads, [which was] the cause of the greatest alarm" to the conspirators. CA App. 6576.[4]

The railroad conspirators' response to this threat was extensive and closely coordinated. To forestall the proliferation of private docks, the railroads agreed to place restrictive covenants in leases or sales of railroad-owned dock properties to "limit[] the commodities to be handled" by those who leased such properties. CA App. 6479. Such restrictions were a principal means by which the conspiracy achieved its objectives. Thus, for example, one railroad leased dock property to a nonrailroad but provided it could not be used as a "site for handling and storage of . . . iron ore and coal received in lake vessels." CA App. 6589; *see also* CA App. 6480.

For years, the railroad conspirators blocked efforts by Respondent Erie to buy or lease an abandoned railroad-owned dock for a self-unloading iron ore facility. One railroad conspirator described the land sought by Erie as of "great strategic value to any party hoping to put together a pellet handling facility." CA App. 7138. Per-

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[4] *See also*, CA App. 6460, 6890, 7460, 2459-60, 2464-65, 2470, 2442-44, 6528, 6575, 6596.

ceiving "grave dangers . . . inherent in giving any non-railroad operator access to facilities suitable for the handling of iron ore pellets," CA App. 7482, the conspirators agreed to "resist" any sale or lease "in the absence of protective measures to prevent the use of any Erie waterfront property for coal and ore purposes." CA App. 7155. Thus, the railroads refused to sell Erie the dock unless the deed was "restricted so no competitive coal or ore facilities might be erected." CA App. 6889. As one conspirator boasted to the others, "[w]e have strongly resisted for years all proposals to sell or lease the Erie Ore dock." CA App. 7952.

The railroad conspirators also suppressed competition by agreeing to boycott private docks. Once the possibility of unloading pelletized ore on private docks became a real threat, several railroads, in furtherance of the conspiracy, *cancelled* competitively priced rail service from those properties to the steel mills.[5] Other railroads consistently refused to provide competitive rail service from private docks to the mills.[6] Railroad documents make clear that these actions were taken for the express purpose of suppressing the development of self-unloader technology and competition from private docks.[7]

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[5] The B&O railroad eliminated such service from three private docks because it "would not have any control over the charge that may be assessed against self-unloaders that may discharge iron ore at these particular spots." CA App. 6464, 6469.

[6] CA App. 6527, 6535, 6876, 6895, 7994, 8256.

[7] CA App. 8413 (competitive rail service from private docks "would unquestionably result in private docks being preferred"). Iron ore was *never* transported under general railroad "class rates" (which were "catch-all rates" applicable to any commodity not otherwise specifically provided for), because those rates were two to three times higher than the "iron ore line haul" rates. B&LE concedes that without iron ore line-haul rates the private "docks were not economically viable." Pet. at 14 n.9.

Ambrosia, Tauro and other trucking companies were also targets of the conspiracy. One railroad memorandum warned that "[w]e do not want to provide an area at which a self-unloader dock for iron ore pellets may be constructed which, in turn, might be used to truck iron ore." CA App. 7151, 7278. Conspirators cautioned that an unrestricted lease of railroad-owned property to a would-be competitor "would, in effect, create a [non-railroad] dock, and the ore could . . . be trucked." CA App. 7475. A leading conspirator warned "[t]here is one thing about rates from a private facility which has always bothered me, and that is the possibility of trucking." The railroads feared that providing competitively priced service from a non-railroad dock would enable such docks to handle pelletized ore, which in turn "might influence a movement by truck." CA App. 6626. The president of one conspirator railroad warned the president of another that there were "many other facets of [a particular] proposal which are disturbing, including the possibility of trucking ore from a private facility." CA App. 7461.

The conspirators also agreed to refuse to accept any self-unloaders at their docks,[8] or to charge the same dock handling rates for self-unloaders as for bulkers, thus imposing charges for unloading services neither required nor performed by the docks for those vessels. *See United States v. B&LE Ry. Co.*, 717 F.2d at 601 (noting that this conduct was illegal and not immunized by the Interstate Commerce Act). They undertook this course for the specific purpose of suppressing incentives to develop self-unloaders by eliminating cost savings self-unloaders would otherwise have accomplished.

The railroads agreed to forego independent action, and used coercion to ensure fealty to the conspiracy's objec-

[8] B&LE refused to handle self-unloaders at Conneaut, Ohio. Penn Central refused to handle self-unloaders at Ashtabula. CA App. 7453. N&W refused to handle self-unloaders at its Huron Dock. CA App. 6495, 7391, 6894, 7311, 7317.

tives. For example, the conspirators convened a meeting in 1971 in response to a proposal by C&O to lease private dock space to a potential competitor. A B&LE memorandum reports a "negative reaction" of the conspirators that was "immediate and vocal." One railroad indicated that it had "resisted similar pressures to establish comparable arrangements at the ore docks at Erie." The conspirators threatened "rate wars" on commodities important to C&O's revenues if C&O implemented its proposal. CA App. 7456. A follow-up letter from the president of one railroad noted that C&O's proposal was "of great concern to . . . all of the major Eastern lines," and reiterated that the "competitive reaction of other rail carriers would be immediate, maybe even over-compensatory." CA App. 7460-7462. C&O's proposal was withdrawn.

B&LE was integral to this conspiracy from its inception, and participated in every significant conspiratorial meeting. CA App. 6457, 6483, 6631, 6897.[9] B&LE also went to great lengths, along with the other conspirators,

[9] During the period of the conspiracy, B&LE was a wholly owned subsidiary of U.S. Steel. Because U.S. Steel was the last steel company to pelletize its ore, it had significant incentives to delay the development of self-unloader technology in order to deprive its competitors of a transportation cost advantage. CA App. 7496, 4317, 4324-27. B&LE chaired a special committee that blocked a B&O proposal to handle self-unloaders. At B&LE's instigation, the conspiracy brought N&W back in line when it began to handle a few self-unloaders. CA App. 6883, 6887, 6894. B&LE called a meeting to discuss ways to combat the competitive threat of trucks. CA App. 135. B&LE then chaired a "Special Committee" that monitored and laid plans to combat truck competition. The Committee met in B&LE's offices, CA App. 7943, where B&LE's report on trucking was discussed. CA App. 7990, 7955. Acting as watchdog for the conspiracy, B&LE notified the other conspirators when it discovered that the Pittsburgh & Lake Erie Railroad had established competitive rail service from the private Pinney Dock. CA App. 8394. The notice enabled conspirators (including B&LE) to discuss retaliatory actions against the Pittsburgh & Lake Erie, and the actions were then taken by the appropriate conspirators. CA App. 8410.

to conceal the conspiracy "so as to avoid directing attention" to their actions "and possibly also lay ourselves open to litigation." CA App. 6496. Railroad officials repeatedly met in secret, deliberately ignoring the procedural requirements of the rate bureaus (which permitted them to set rates collectively only in public meetings), and repeatedly took steps to ensure that "[t]here was no committee record" of these meetings and that minutes were "not disclosed to anyone in any manner." CA App. 7313.[10]

Despite the railroads' efforts, the conspiracy eventually came to light as a result of a civil suit filed in 1980. Criminal indictments, resulting in B&LE's *nolo contendere* plea, followed in short order.

B. District Court Proceedings

Between 1982 and 1984, five steel companies, three private docks (including Erie), and three trucking companies (including Ambrosia and Tauro) filed separate antitrust actions against B&LE and other railroads seeking treble damages for injury inflicted by the conspiracy. The cases were consolidated in the Eastern District of Pennsylvania.

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[10] The conspirators' conduct violated the Interstate Commerce Act not only because the conspirators shaped their strategies in clandestine meetings that were not subject to public scrutiny, but also because the conspirators agreed to forego their right to deal independently with private docks and trucks, with obedience to that agreement enforced through coercion by the conspirators. *See generally United States v. Baltimore & Ohio R.R.*, 538 F. Supp. 200, 207-09 (D.D.C. 1982), *aff'd sub. nom. United States v. B&LE Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983). Thus, as the jury specifically found, B&LE's conduct in the conspiracy was not "reasonable" under "the regulatory policies under which defendant operated." Indeed, the jury found that B&LE lacked even a "good faith belief" that its conduct "was required by ICC regulations." CA App. 1902.

1. *Pretrial Proceedings*

The district court dismissed several damage claims before trial. In particular, applying *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), the court dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs," *i.e.*, all claims in which plaintiffs sought a rebate of overcharges actually paid to the railroads for tariffed services. *See* Pet. App. 21a, 29a.

2. *Trial Proceedings*

Trial commenced in May 1989. The liability phase lasted six weeks. The jury heard the testimony of dozens of witnesses, and reviewed thousands of documents (most from the railroads' files). At the close of the evidence, the trial court gave careful and lengthy instructions informing the jury that B&LE and the other conspirators would be entirely immune under the antitrust laws "for agreements and understandings related to tariffs and relating to agreements affecting tariffs as long as they were in compliance with the Rate Bureau procedures and consistent with that." CA App. 5002.

The district court charged the jury that, in addition to immunity under the Interstate Commerce Act, B&LE could claim the benefit of the *Keogh* damages bar to the extent plaintiffs sought a rebate for alleged overcharges:

> [O]nce a rate is being charged pursuant to a duly filed tariff which has not been disapproved by the Interstate Commerce Commission, then it is conclusively presumed so far as the law is concerned that that charge is a reasonable one. And what that means is that nobody can claim damages under the antitrust laws or any other law—no shipper who pays railroad rates, who pays freight charges to a railroad—can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been. As long as those charges were pursuant to a duly filed tariff, they are presumed to

> be reasonable; and the place to challenge their reasonableness is with the Interstate Commerce Commission and not in a court of law in an antitrust case.

CA App. 4982. The court specifically repeated the charge that "nobody can make a claim for damages measured by or based upon the fact that they paid a rate authorized by an ICC-approved tariff by claiming that that rate was too high." CA App. 5029-30.

The liability jury returned verdicts in favor of all plaintiffs except one dock company (Reaney). The jury specifically found, in a series of interrogatory responses, that B&LE participated in the conspiracy to suppress competition in the transportation of iron ore by delaying the development of self-unloader technology, precluding competition from private docks, and impeding truck competition, and that this conduct was a material cause of injury to all plaintiffs (except Reaney). The jury expressly found that B&LE's conduct was not undertaken in conformity with the rate bureau procedures of the ICA, and was not premised on a good faith belief that its conduct was within this ICA immunity.

A separate damages jury was then empaneled. Using typical methods of damage calculation, plaintiffs estimated the costs, prices and profits that would have existed but for the illegal conspiracy. Erie, Ambrosia, Tauro and the other competitor plaintiffs estimated the profits they would have earned on the iron ore business from which they were foreclosed. The steel companies estimated the transportation cost savings they would have achieved had they been able to use competitors of the railroads. Plaintiffs' damage estimates were carefully integrated to preclude duplicative awards. For example, no dock or truck company claimed lost profits on business claimed by another dock or truck company. The damages jury awarded some, but far from all, of the damages sought by plaintiffs—and expressly denied certain categories of damages.

3. *Post-trial Proceedings*

B&LE challenged the liability and damages findings in a motion for judgment notwithstanding the verdict. The district court rejected the motion, concluding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy . . . to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold in the transportation of ex-lake iron ore." Pet. App. 29a.

With respect to *Keogh*, the court acknowledged that "[r]ailroad rates and charges which are subject to the jurisdiction of the Interstate Commerce Commission are conclusively presumed to be reasonable, hence the defendant cannot be held liable for damages under the antitrust laws because a plaintiff has been required to pay such rates or charges." Pet. App. 95a. But, the court held,

> *these issues were fully explained to the respective juries, and there is no present contention that either charge was erroneous.* The liability jury found that the defendant had, indeed, violated the antitrust laws by conduct which was *not* immune from antitrust scrutiny, and the damages jury found that plaintiffs' damages were attributable to *non-immune* conduct. . . . These findings are amply supported by the evidence.

Pet. App. 96a (emphasis added).

C. The Third Circuit's Decision

The Third Circuit affirmed the district court in all respects relevant to B&LE's petition. The appeals court recognized that the district court had dismissed all claims seeking rebates of overcharges for tariffed services, and affirmed the district court's conclusion that "plaintiffs proved at trial an antitrust conspiracy that was *not* grounded in rate-related claims" of the kind barred by *Keogh*. Pet. App. 34a (emphasis added). The court thus applied the recognized distinction between "overcharge"

claims, which *Keogh* bars, and claims that regulated entities sought to preclude market entry by new competitors through a broad range of anticompetitive conduct. Indeed, the court specifically held that "it is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market." Pet. App. 32a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW RESPECTING *KEOGH*.

The *Keogh* issues raised by B&LE do not warrant plenary review. B&LE opposed certiorari on similar questions five years ago in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), but now urges this Court to grant review to adopt a sweeping ruling expanding *Keogh* beyond its current well-established limits. As will be demonstrated, plenary review is even less warranted now than it was in *Pinney*.

A. The Limits of the *Keogh* Doctrine Are Well-Established and Were Properly Respected by the Court of Appeals.

B&LE's principal plea for review rests on an unprecedented and untenable characterization of the *Keogh* doctrine, including its application to shippers in market preclusion cases. The Third Circuit's application of *Keogh* was entirely correct, and presents no genuine conflict with a decision of this Court or any court of appeals.

1. *Keogh* provides antitrust violators with a narrowly circumscribed protection from treble damages. In every case in which this Court has recognized a *Keogh* bar to

treble damages, a shipper complained that filed rates it actually paid a carrier were inflated as a result of price-fixing, and invoked the antitrust laws to seek what amounted to a rebate of the allegedly excessive part of the rate. In *Keogh* itself, the Court made clear that the bar applied only to an individual shipper's claims for damages that, "like a rebate," would refund to the shipper the difference between the rate paid the carrier and the lower rate the shipper allegedly would have paid the carrier absent the price-fixing. 260 U.S. at 162. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), the State of Georgia sought damages as *parens patriae* on behalf of its citizens for alleged rate overcharges resulting from price fixing. And in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, plaintiffs alleged that the filed rates they paid for motor carrier transport were inflated as a result of price-fixing, and sought damages "measured by th[e] difference" between the inflated rate and the rate that allegedly would have been filed with the ICC absent the price-fixing. 476 U.S. 409, 413 (1986).[11]

Keogh has been limited to cases where shippers effectively seek "rebates" of filed-rate "overcharges" because *Keogh*'s policy rationales apply only in that narrow circumstance. The principal justification for the damages bar is protection of "the paramount purpose of Congress [in enacting the ICA]—prevention of unjust discrimination." 260 U.S. at 163. That purpose "might be defeated" if one shipper recovered a *de facto* "rebate" of filed rates by succeeding in litigation while other shippers continued to pay the filed rate. *Id.* *See also Square D*, 476 U.S. at 423 n.30 ("the *Keogh* concern" was with antitrust damages "operating as a discriminatory rebate");

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[11] As this Court noted in *Square D*, the Second Circuit, after barring damages for tariff "overcharges," remanded to the district court to permit plaintiffs to "amend their complaints to state possible claims for damages not arising from the filed tariffs" paid by the plaintiffs to the carriers. 476 U.S. at 417 n. 19; *id.* at 414. The Second Circuit's ruling was affirmed by this Court.

id. at 423 ("the expressed concern [was] about unfair rebates"). *Keogh* also sought to protect the ICC's regulatory prerogatives by precluding courts from speculating as to what alternative shipper rates the ICC would have approved for tariffed service in lieu of the excessive rates caused by the antitrust violation. 260 U.S. at 163-164.

Limiting *Keogh* to shipper rebate claims is entirely consistent with, if not required by, the established principle that exemptions from antitrust liability are "strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." [12] Confining *Keogh* to these recognized boundaries is also consistent with the clear import of *Square D* that "*Keogh* . . . was unwise as a matter of policy" and persists solely for reasons of *stare decisis*. 476 U.S. at 420, 423-424. As *Square D* makes clear, there is simply no warrant for extending *Keogh* beyond its traditional narrow scope.

2. The limits of *Keogh* are equally settled in the courts of appeals. Courts apply *Keogh* where shippers use the antitrust laws to seek what amounts to a rebate for alleged overcharges paid as a result of price-fixing.[13] But courts refuse to apply *Keogh* where—as here—plaintiffs do not seek a rebate of the difference between what they actually paid the carrier and what they would have paid the carrier in the absence of price-fixing, but instead seek to recover non-overcharge damages (lost profits or busi-

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[12] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); *see also Nat. Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-389 (1981); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

[13] *E.g., In re Wheat Rail Freight Ry. Antitrust Litig.*, 759 F.2d 1305 (7th Cir. 1985), *cert. denied sub. nom., Little Crow Milling Co. Inc. v. Baltimore & Ohio R.R.*, 476 U.S. 1158 (1986); *H.J. Inc. v. Northwestern Bell Telephone Co*, 954 F2d 485 (8th Cir.), *cert. denied*, 112 S.Ct. 2306 (1992).

ness losses) inflicted by anticompetitive behavior designed to destroy competitors and suppress competition in a regulated industry. *See Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *City of Kirkwood v. Union Electric Company*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka, Indiana v. Indiana & Michigan Electric Company*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). In each of these cases, the court rejected the claim that *Keogh* should bar all antitrust damages—not just "overcharge" damages—whenever market preclusion in a regulated industry is at issue.[14]

3. The *Keogh* rulings of the courts below expressly followed this well-established body of law. The district

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[14] The distinction is also well established in the district courts. *See Capital Freight Serv. v. Trailer Marine Transport*, 704 F. Supp. 1190, 1192, 1197 (S.D.N.Y. 1989) (carriers' "various anticompetitive actions" give rise to treble "damages not for the increased rates it was forced to pay, but for lost sales and profits and the going concern value of its destroyed business"); *Delaware & Hudson Ry. Co. v. Conrail*, 654 F.Supp. 1195, 1205 (N.D.N.Y. 1987) ("D&H seeks to establish that Conrail engaged in a broad pattern of conduct specifically designed to eliminate D&H as a competitor. The plaintiff's damages will be measured not by the difference between existing rates and some hypothetical rates, but by business losses it has allegedly sustained"); *Trans-Kentucky Transport v. L&N R. Co.*, 581 F.Supp. 759, 767 (E.D. Ky. 1983) ("Plaintiffs do not ask the Court simply to find specific rates to be unreasonably high and to lower them retroactively to reasonable levels. Instead, plaintiffs seek to establish that defendants engaged in a broad pattern of conduct, including but not limited to the manipulation of rates, specifically designed to destroy the TTI project as a competitor. Damages would be measured . . . by the business losses plaintiffs have sustained").

court applied *Keogh* to dismiss all claims seeking rebates for alleged overcharges by the railroads for tariffed services provided to the shipper plaintiffs. The court was careful to instruct the jury that "no shipper who pays railroad rates, who pays freight charges to a railroad[,] can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been," so long as the rates had been filed with the ICC. But the court properly permitted the jury to consider all "non-rate claims" by shippers and competitors, *i.e.*, all claims that did not seek rebates for alleged overcharges for railroad services actually provided to plaintiffs. CA App. 4982.

The Third Circuit also observed the well-established distinction between overcharge rebate claims and market preclusion claims. As the court held, "it is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market." Pet. App. 32a. B&LE does not dispute that *Keogh* has no application to railroad conduct precluding the emergence of private docks—and as the Third Circuit concluded, that conduct "eliminated much of the economic incentive to use self-unloaders." Pet. App. 19a.

As the Third Circuit recognized, the policies underlying *Keogh* have no application here. None of the plaintiffs sought damages for the difference between what shippers paid the railroads and what they would have paid the railroads absent the conspiracy. And none of the damages awarded even remotely pose a threat of rate discrimination among shippers. Damages to the dock and truck company plaintiffs could not amount to a *de facto* rebate because those plaintiffs did not pay any railroad for any carrier services. The primary injury suffered by the

steel company plaintiffs was the transport savings they lost because they could not use self-unloaders to transport ore across Lake Erie. The ICC has no power to compensate the steel companies for those damages. Nor does the other component of the steel companies' recovery—lost savings for dock handling charges—implicate *Keogh* policies. The steel companies based their damages case entirely on estimates of handling charges they would have paid to nonrailroad docks absent the conspiracy to suppress the development of such docks. Because those rates were entirely unregulated, no judgment as to what lower rates the ICC would have approved for the service is required.

4. There is no basis for B&LE's claim that the Third Circuit's application of these settled principles *"creates* a division among the courts over whether the doctrine applies to conspiracies involving mixed rate and non-rate activities to exclude competitors from a market." Pet. at 10 (emphasis added). Suggesting that the present case "created" a conflict, B&LE inexplicably ignores the large number of *prior* cases that, like the Third Circuit here, confine *Keogh* to overcharge rebate claims by shippers. Instead, B&LE points to the Sixth Circuit's 1988 opinion in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, and the Fourth Circuit's *unpublished* affirmance of *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 805 F.Supp. 1277 (D.S.C. 1992), *aff'd mem.*, 998 F.2d 1009 (4th Cir.) (Table), *pet. for cert. filed*, No. 93-456 (Oct. 4, 1993), as its sole evidence that "the holding below flatly . . . conflicts with holdings of at least two other circuits." Pet. at 14. The alleged conflict is illusory.

Lifschultz Fast Freight presents no conflict. The Fourth Circuit plainly did not consider its unpublished ruling to be in conflict with the law of any other Circuit because Fourth Circuit rules require publication if a decision "creates a conflict with a decision in another circuit." Fourth Circuit Internal Operating Procedure 36.4(v). In-

deed, the court's order plainly states that "[u]npublished opinions are not binding precedent in this circuit." [15] Moreover, the district court in *Lifschultz* raised *Keogh* as an *alternative* ground for decision after granting summary judgment on all claims because the plaintiff failed to produce evidence to prove them. *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 805 F. Supp. 1277, 1289-94 (D.S.C. 1992). The unpublished Fourth Circuit order generally approved the district court's reasoning as "sound," but did not adopt or endorse the court's *Keogh* ruling. For these reasons, the unnecessary discussion of *Keogh* in the district court's *Lifschultz* opinion plainly creates no need for plenary review. In any event, *Lifschultz* involved a direct attack on the legality of filed rates. It thus does not raise issues remotely like those raised in the present case. 805 F. Supp. at 1282, 1294.

Nor does the Sixth Circuit's 1988 decision in *Pinney* present a genuine conflict. In that case, as in this one, the court held that *Keogh* did *not* bar damages for exclusionary conduct such as refusal to lease dock sites to plaintiffs and harassment of competitors. 838 F.2d at 1457. The Sixth Circuit then stated that "it would . . . appear that" other claims like those at issue here would be barred by *Keogh*, but "[r]ather than requiring outright dismissal of these claims," the court gave plaintiffs "an opportunity on remand to amend their complaint in order to clarify these allegations to state a claim for damages consistent with *Keogh*." 838 F.2d at 1458. Thus, the Sixth Circuit did not finally resolve the issue on which B&LE claims there is a conflict.

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[15] *See* Dkt. No. 92-2523 (4th Cir. July 6, 1993), slip op. at 2. As this Court has noted, unpublished dispositions have "an assumed lack of precedential effect." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). In the Fourth Circuit, the court will cite unpublished opinions only in "unusual circumstances" and "disfavor[s]" litigants' citation of them. Fourth Circuit Internal Operating Procedure 36.6.

Moreover, because *Pinney* was decided on interlocutory review, the Sixth Circuit did not have the benefit the Third Circuit had here of a full factual record after an extensive trial and detailed jury interrogatory responses finding specific misconduct that plainly falls outside the scope of *Keogh*. Accordingly, the factual underpinnings of the decision were different in *Pinney* respecting the critical issue on which B&LE posits a conflict. For these reasons, *Pinney*'s status is far from clear.

Plenary review is also unwarranted because the purported "conflict" identified in B&LE's petition already existed when this Court denied certiorari in *Pinney*.[16] In the five years since certiorari was denied in *Pinney*, no court of appeals has agreed with *Pinney*'s suggestion that *Keogh* might extend beyond overcharge rebate claims. At most, *Pinney* represents a divergence in the *application* of *Keogh* to a single, extremely complex factual setting that is unlikely ever to recur. For this reason, *Pinney* is unlikely to be of continuing significance. There is thus even less reason for plenary review now than there was when certiorari was denied in *Pinney*.

Furthermore, as B&LE informed the Court in opposing certiorari in *Pinney*, because rail rate bureaus no longer exist, issues of the sort raised in the petition will not recur with any frequency.[17] The regulatory landscape and the role of the ICC have been dramatically altered by congressional action removing rate regulation and reinstating competition in the transportation marketplace. It is thus particularly inappropriate for B&LE to argue that *Keogh* should now be *expanded* to insulate broad anticompetitive conspiracies, in an era of substantial *contraction* of rate regulation as a policy tool in the rail and trucking industries.

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[16] Aside from the ruling below, every other case rejecting the suggestion that *Keogh* applies beyond "overcharge" cases had already been decided prior to *Pinney*.

[17] Brief in Opposition in No. 88-72, at 3, 6, 12.

In short, there is simply no need for plenary review of whether *Keogh* should be expanded beyond its traditional and well-recognized limits.

B. There Is No Need For Plenary Review of the Court of Appeals' Holding That *Keogh* Does Not Bar Damages In Suits Brought By Competitors.

Nor should this Court grant review to consider B&LE's alternative claim that *Keogh* bars treble damages in suits brought by competitors, rather than customers, of a regulated carrier. That issue is not presented because *Keogh* does not apply at all to the exclusionary conduct injuring shippers *and* competitors on which the jury's damage awards were based. *See* Point I.A. *supra*. Review is unwarranted in any event because the Third Circuit's refusal to extend *Keogh* to competitor claims was plainly correct and in accord with settled law.

1. In *Keogh* itself, the Court held that "[t]he legal rights of *shipper as against carrier* in respect to a rate are measured by the published tariff." 260 U.S. at 163 (emphasis added). The Court made clear that "[u]nless and until suspended or set aside, this rate is made for all purposes, the legal rate, *as between carrier and shipper.*" *Id.* (emphasis added). Similarly, in *Square D*, the Court emphasized that "*Keogh* simply held that an award of treble damages is not an available remedy for *a private shipper* claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation." 476 U.S. at 422 (emphasis added).

Notwithstanding the Court's obvious care in both *Keogh* and *Square D* to limit the *Keogh* damage bar to cases in which *shippers* claim overcharges, B&LE argues that the 1945 decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), extended the *Keogh* doctrine to competitor suits. That argument is plainly wrong.

The state of Georgia sought *damages* from the carrier only as a shipper and as *parens patriae* representative of other shippers. Georgia sought damages for itself only in

its "proprietary capacity" as "a shipper of goods and commodities." [18] Georgia sued the railroad on behalf of its citizens, *not* to recover lost income or profits, but to recover amounts paid to the railroad that were higher than the amounts the railroad would have been paid absent the conspiracy. The Court barred these damage claims solely because "[t]he legal rights of a *shipper* against a carrier in respect to a rate are to be measured by the published tariff." 324 U.S. at 453 (emphasis added).

The *Georgia* Court said *nothing* to indicate that *Keogh* would bar competitors' damage claims. Thus, *Georgia* cannot plausibly be read as extending *Keogh* to competitor suits. As the Third Circuit correctly noted in this case, "it is obvious that in rendering its decision the court's focus was on Georgia's claims as a customer." Pet. App. 37a & n.6.

This Court's rulings make clear that the policy justifications for *Keogh* simply do not apply in the competitor context.[19] Competitors such as the dock and truck plaintiffs seek damages resulting from lost profits and other business losses, *not* a rebate of customer overcharges resulting from the difference between rates charged and hypothetical rates that would have been charged by the carrier in the absence of an alleged antitrust activity. The dock and truck company plaintiffs in this case, for example, did not pay any rates, filed or otherwise, to the railroads. No rate payment is "exacted" from these

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[18] 1944 Term, Brief on Behalf of State of Georgia's Motion for Leave To File Amended Bill of Complaint at 7, 10, 27-28.

[19] As Judge Friendly noted in his opinion for the Second Circuit in *Square D*, in "suits by competitors rather than users of the service . . . many of the considerations relied upon in *Keogh* would not apply." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1352, 1356 (2d Cir. 1985). In addition, the difference between competitor claims and shipper claims was squarely brought to the attention of this Court in *Square D*, *see* Amicus Brief of C.D. Ambrosia Trucking Co. et al., in No. 85-21. Thus, the Court was clearly aware of that difference when it repeatedly described *Keogh* as a doctrine applicable to "private shippers."

competitors. *See Keogh,* 260 U.S. at 163. Because the competitors have paid nothing to the defendant, they obviously are not seeking rebates of overcharges. Like any competitor, the dock and truck company plaintiffs sought lost profits and business losses—well-established measurements of damages that do not raise the issues implicated in the customer context. Awarding such damages does not require any change in the rates set by the regulatory body. The competitor simply recovers for losses resulting from the antitrust violation.

2. The Third Circuit's ruling is also in accord with the well-recognized rule in the courts of appeals that *Keogh* does not apply to competitor suits. The rule was firmly established in the Third Circuit and elsewhere long before the present case. *See Essential Communications Systems, Inc. v. AT&T,* 610 F.2d 1114, 1116 (3d Cir. 1979). In *Essential,* the Third Circuit refused to extend *Keogh* to competitor claims, concluding that "the filed tariff rule has little or nothing to do with [a carrier's] duties under the antitrust laws toward its competitors . . . competitors are not the intended beneficiaries of that rule of public utility regulation." 610 F.2d at 1121. *Essential* recognized that "[t]here is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the anti-discrimination purposes of the filed tariff rule" because "[t]he Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff . . . [and] can continue to collect those revenues until a new tariff is filed." *Id.* at 1122.

In *City of Kirkwood v. Union Electric Co.,* the Eighth Circuit agreed with *Essential,* holding that "[a] rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors." 671 F.2d at 1179. The Second and Ninth Circuits have likewise concluded that *Keogh* does not bar competitor damage claims. *See City of Groton v. Connecticut Light & Power Co.,* 662

F.2d at 929; *Clipper Exxpress v. Rocky Mountain Tariff Bureau, Inc.*, 690 F.2d at 1267.[20]

3. Certiorari is not warranted to resolve the purported "conflict" between this well-established line of authority and the Sixth Circuit's application of *Keogh* to competitor claims in *Pinney*. For reasons discussed above, it is far from clear that *Pinney* presents a genuine conflict. *See* pages 18-19 *supra*. Even if *Pinney* presents a technical conflict on the competitor issue, guidance from this Court is not needed. When this Court considered the petition for certiorari in *Pinney*, the "conflict" between that decision and a well-established body of contrary authority already existed and this Court saw no need to grant review.[21] Nothing that has happened in the five years since certiorari was denied in *Pinney* should alter that judgment. No court of appeals has followed *Pinney* in extending *Keogh* to competitor claims—which is hardly surprising given rate deregulation. Indeed, this aspect of *Pinney* does not appear to have been applied in any other case even within the Sixth Circuit. B&LE's claim that the Fourth Circuit adopted this position in *Lifschultz* is incorrect, as demonstrated *supra* at pages 17-18.[22] Every dis-

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[20] B&LE's claim that there is a "conflict among the circuits concerning the application of *Keogh* to competitors' claims arising out of rates for electricity" is meritless. *See* Pet. at 19 n.13. The one case B&LE cites as creating the conflict, *Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991), did not even mention *Keogh*. *Concord* concluded, largely as a matter of economic theory, that the conduct at issue there did not violate the antitrust laws. Thus, *Keogh*, which bars damages for conduct concededly in violation of the antitrust laws, simply was not at issue. This Court's denial of certiorari in 1991 in *Concord* casts considerable doubt on B&LE's claim of a conflict: *City of Groton* and *Kirkwood*—the cases allegedly in conflict with *Concord*—were decided well before 1991.

[21] The Second, Third, Eighth and Ninth Circuit decisions refusing to extend *Keogh* to competitor suits all predated *Pinney*, and all postdated *Georgia v. Pennsylvania R.R. Co.*

[22] The competitor issue was not even mentioned by the Fourth Circuit, which merely noted that the district court held as an

trict court to consider the question, except the district court in *Lifschultz,* has rejected *Pinney*'s reasoning.[23] That one district court in the last five years has cited *Pinney* approvingly in an alternative holding certainly does not justify plenary review, for the reasons discussed *supra. Pinney*'s unwarranted extension of *Keogh* to competitor suits is plainly an aberration that has garnered no substantial following.[24]

II. B&LE'S *ILLINOIS BRICK* ARGUMENT IS INAPPLICABLE TO THE COMPETITOR PLAINTIFFS, AND INCORRECT WITH RESPECT TO THE STEEL COMPANIES.

B&LE alternatively suggests that the Court should grant certiorari to determine whether *Illinois Brick* [25] bars certain of the plaintiff steel companies' claims. As B&LE concedes *sub silentio,* its argument has no application to the competitor dock and truck plaintiffs, or to National Steel which owned its own fleet of self-unloaders. Even with respect to the other steel companies, the argument is meritless and provides no basis for granting certiorari.

"alternative ground" that the plaintiff's claims were barred because "the claims were collateral attacks on the rates and tariffs set before the Interstate Commerce Commission." 1993 WL 241742, at 2.

[23] *See, e.g., Capital Freight Serv., Inc. v. Trailer Marine Transport,* 704 F. Supp. 1190, 1197 (S.D.N.Y. 1989); *Frontier Enter., Inc. v. Amador Stage Lines,* 624 F. Supp. 137, 143 (E.D. Cal. 1985); *Delaware & Hudson Ry. Co. v. Conrail,* 654 F. Supp. 1195, 1205 (N.D.N.Y. 1987); *Marneel v. United States Parcel Service of America, Inc.,* 260 F. Supp. 391, 406 (N.D.Cal. 1966).

[24] As the United States noted in supporting *en banc* reconsideration before the Sixth Circuit in *Pinney, Pinney*'s position respecting competitor suits is "puzzling and wrong" and "threatens proper antitrust enforcement." Memorandum of the United States as Amicus Curiae in Support of Suggestion for Rehearing En Banc, *Pinney Dock and Transport Co. v. Penn Central Corp.* (6th Cir., filed March 23, 1988).

[25] *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737, 744 (1977).

1. In *Illinois Brick*, this Court held that where a manufacturer illegally overcharged a direct purchaser, an indirect purchaser down the distribution chain could not recover under the antitrust laws on a claim that the "overcharge" had been "passed on" to it. B&LE did not argue in the trial court that *Illinois Brick* applied to the competitor plaintiffs. Similarly, in the Third Circuit, B&LE only argued that "[u]nder *Illinois Brick* and its progeny, *the steel company plaintiffs* are barred from recovering antitrust damages," but never challenged the dock and truck company verdicts, or the National Steel verdict, on this basis. (App. Br. at 38 (emphasis added)). *Accord id.* at 42-54 (same). In this Court, B&LE again argues only that *Illinois Brick* bars "the steel companies' award in this case." Pet. at 22; *see also id* at 23, 28.

B&LE thus may not obtain plenary review of the question whether *Illinois Brick* forecloses the damage awards to the dock and truck company plaintiffs, and to National. To the extent B&LE seeks review with respect to the competitor plaintiffs, its petition must be denied. It is clear, in any event, that *Illinois Brick* has nothing to do with the claims of the competitor plaintiffs. They claim that the railroad conspirators took numerous acts (e.g., refusal to lease docks to private operators that would allow trucking of iron ore; restrictions prohibiting such facilities from handling iron ore; etc.) that were specifically aimed at eliminating them as low-cost competitors. *See generally* ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 654-55 (3d Ed. 1992) (*"Illinois Brick* does not preclude recovery by a plaintiff who is a competitor of the defendants rather than a purchaser and who does not seek to recover damages based on a passed-on overcharge").

2. B&LE's arguments for plenary review are also completely unpersuasive with respect to the shipper plaintiffs, the only plaintiffs against whom *Illinois Brick* was asserted below. B&LE argues that the court of appeals

subsumed *Illinois Brick*'s bright-line rule as a constituent part of the standing test established in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and then posits a split among the lower courts on this and related issues. This conflict, however, is entirely contrived.

Illinois Brick applies when a plaintiff's recovery requires proof of overcharges passed down through a chain of distribution. *See* ANTITRUST LAW DEVELOPMENTS, *supra*, at 654 (and cases cited therein). The application of *Illinois Brick* outside this passed-on overcharge context has not been an issue of significance in the lower courts—to the contrary, only sporadic lower court cases over the years have had occasion to even consider the matter.[26]

The factual record in this case simply does not raise an *Illinois Brick* issue with respect to the steel companies. The railroads' aim of preventing steel companies from taking advantage of alternative technology and competitors was achieved by a broad array of devices, including refusal to sell or lease property to nonrailroad dock operators, imposition of lease restrictions to prevent docks from handling iron ore from self-unloaders, refusing to provide competitive rail service from private docks, refusing to handle self-unloaders at railroad docks, and coercion against railroads which were considering a departure from the conspiracy. In seeking damages directly caused by this conduct, the steel companies demonstrated that they were *direct* purchasers of the railroad dock and transport services, and potential *direct* purchasers of the suppressed self-unloader and private dock transportation system. The evidence simply does not permit the conclusion that the steel companies were indirect purchasers.

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[26] *See, e.g., Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1101 (D. Md. 1979); *Petrol Stops Northwest v. Continental Oil Co.*, 1978-2 Trade Cases ¶ 62,304 (D. Col. 1978).

B&LE thus has no plausible basis for arguing that the Third Circuit's ruling departs from this Court's prior holdings or demonstrates a circuit conflict. The Third Circuit did *not* hold that even where *Illinois Brick* applies, its bright-line rule may be ignored so long as the *AGC* standing test is satisfied. Instead, recognizing that the *Illinois Brick* rule did *not* apply on these facts, the Court appropriately undertook the standing analysis required by *AGC*. In doing so, the court of appeals *also* took into account the general concerns that underlie the *Illinois Brick* rule—precisely as this Court did in *AGC* itself. 459 U.S. at 543-44.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' TOLEDO WORLD TERMINAL, INC. AND WILLS TRUCKING, INC. BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether antitrust damage claims "based exclusively on conduct unrelated to rates" are barred by the *Keogh* doctrine.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Respondents, Toledo World Terminal, Inc. and Wills Trucking, Inc., are corporate affiliates.

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STATUTE

49 U.S.C. § 6(1) 7

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RESPONDENTS' TOLEDO WORLD TERMINAL, INC. AND WILLS TRUCKING, INC. BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-90a) is reported at 998 F.2d 1144. The opinion of the district court on motions for new trial and judgment notwithstanding the verdict (Pet. App. 91a-121a) is reported at 759 F. Supp. 219.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1993. The petition for rehearing was denied on July 26, 1993. Pet. App. 121a-131a. The petition for a writ of certiorari was filed on October 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

This brief relates to Respondents, Toledo World Terminal, Inc. and its corporate affiliate, Wills Trucking, Inc., (collectively referred to hereafter as "Wills" or "Wills respondents"), involving Case 91-1587 (D.C. Civil No. 84-02010).

Petitioner, Bessemer & Lake Erie Railroad Company ("B&LE"), unambiguously admitted to the court of appeals that "The Wills plaintiffs['] . . . claims were based *exclusively on conduct unrelated to rates,*" (Appellant Br. at 14)[1] (emphasis added), and therefore the Petitioner's questions presented of whether the *Keogh*[2] doctrine applies to "conspiracies involving mixed rate and non-rate activities" and whether *Keogh* is a "bar [to] competitor's rate-based claims," (Pet. 10), are inapplicable to the Wills respondents' case. Also, the Wills respondents are not steel companies, and therefore, the question presented of whether *Illinois Brick*[3] bars certain of the steel companies' claims is equally inapplicable to the Wills respondents' case. Finally, the court of appeals has remanded the Wills case for a new damages trial, and no review of that decision has been requested. Nevertheless, B&LE requests that this Court review all of the nine cases consolidated into the MDL 587, Lower Lake Erie Iron Ore litigation, and therefore, a short response is appropriate.

A. Factual Background

Mr. Paul Wills founded Wills Trucking, Inc. in 1951, and incorporated the predecessor of Toledo World Terminal, Inc. ("Wills' dock") in 1974. C.A. App. 3404.

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[1] This page of B&LE's opening brief to the Third Circuit Court of Appeals is attached hereto as Appendix A.

[2] *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

[3] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), *rehearing denied*, 434 U.S. 881 (1977).

While Wills was precluded by the conspiracy from obtaining a dock suitable for handling iron ore and engaging in an iron ore business in Toledo, Ohio, Wills did provide a dock-to-mill service to the steel industry. Wills' dock handled commodities like coal, coke and steel, but not iron ore, for National Steel, Republic Steel and Jones & Laughlin Steel. C.A. App. 3406, 3409. Wills Trucking transported various bulk commodities to 30 steel mills across the Midwest, including the transport of non-ore commodities to Armco, Inc.'s steel mills. C.A. App. 3406-08, 10439.

For an entire decade, the Wills respondents attempted to establish a dock operation to provide Armco, Inc. ("Armco") with a lower cost iron ore service. Armco was keenly aware of its competitive disadvantage as the result of being held captive to the railroads' antiquated dock facilities. In an Armco memorandum dated May 30, 1980, company management described its 15-year quest for a self-unloader dock facility in Toledo, Ohio, describing the railroads' Toledo hulett crane docks as being saddled with "excessively high labor demands," "antiquated methods of transfer" and "lack of storage space," which were quickly making Armco "non-competitive." C.A. App. 8496-99.

While Armco was searching for a self-unloader dock, the Wills respondents were actively attempting to lease/purchase Toledo dock facilities to meet Armco's needs. Wills tried negotiating the lease/purchase of five such railroad dock properties from 1969 to 1978. C.A. App. 10442. The B&LE and its co-conspirators thwarted each of these attempts through concerted refusals to sell or lease dock property [4]—conduct having nothing to do with

[4] B&LE pleads for certiorari, claiming, "There is no evidence implicating Petitioner in any conspiracy to refuse to sell or lease space for private docks." Pet. 14, fn. 9. The jury conclusively found otherwise (C.A. App. 1890, 1900), and B&LE does not, and has not, requested review based on the weight of this evidence. Thus no

the rate tariffs on file with the Interstate Commerce Commission ("ICC"), and therefore, being completely outside the scope of the *Keogh* doctrine.

B. Regulatory Background

Wills' private iron ore dock operations never came into existence because of the railroads' non-rate-related, concerted refusals to sell or lease dock property. The jury verdicts are absolutely clear: Wills was injured through B&LE's participation in the concerted "refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio." C.A. App. 1900. B&LE's argument to the court of appeals clearly conceded that the *Keogh* doctrine had no applicability to the Wills respondents, admitting: "The Wills plaintiffs['] . . . claims were based exclusively on conduct unrelated to rates—i.e., the railroads' alleged refusal to sell or lease railroad property for use as dock facilities." Appellant Br. at 14 (Appendix A). B&LE has never recanted its admissions, but has now made generalized statements implying the respondents' claims, including Wills, are rate-related,[5] and thus barred by Keogh. B&LE uses overstated facts and generalities about ICC jurisdiction

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response is needed except to restate the district court's findings that "[l]iterally thousands of documents" establish the illegal conspiracy in which B&LE's participation was nothing short of criminal and was prosecuted as such.

[5] For example:

"Had the court of appeals enforced [*Keogh*] . . . damages in this case would have been zero." Pet. 2.

"The filed tariffs did not provide 'commodity line haul' rates for the carriage of ore from 'private docks' to steel mills." Pet. 4.

"In any event, without a lower rate for transporting the ore to a mill, docks were not economically viable . . ." Pet. 14, fn. 9.

". . . like the dock plaintiffs here, claimed that filed rates caused them injury . . ." Pet. 16-17.

to exaggerate differences between *Pinney Dock*[6] and the decision below. B&LE's strategy falls apart when scrutinized under the actual facts and law underlying the court of appeal's decision. The B&LE's strategy may have changed, but the facts remain the same: Wills' claims are simply not rate-related.

1. *Railroad Commodity Line-Haul Rates vs. Class Rates*

Petitioner, B&LE, first implies this case involves "rates" by charging that "without a lower rate for transporting the ore to a mill, docks were not economically viable," and claiming:

> The rates for transportation were published in tariffs filed with, and regulated by, the ICC. The filed tariffs did not provide "commodity line-haul" rates for the carriage of ore from the "private docks" to steel mills. Instead, the filed tariffs provided "class rates" that applied to those shipments and that were much higher than commodity rates, but were equally subject to plenary ICC regulation.

Pet. 4.

B&LE presents an illusion of rate-relatedness flatly rejected by the jury and both lower courts. In effect, B&LE contends that if it had not engaged in the illegal, non-rate activities—i.e., concerted refusals to sell or lease dock properties, and thus allowing Wills to purchase or lease an iron ore dock, the railroads would have later engaged in collective refusals to extend commodity line-haul rates ("boycotts of unregulated docks"; Pet. App. 34a) and thereby make private dock operations non-competitive. To make this argument B&LE wrongly assumes that private docks did not have the commodity line-haul rate as a matter of right, where the private dock was leasing or purchasing a railroad dock facility having the com-

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[6] *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), *cert. denied*, 488 U.S. 880 (1988).

modity line-haul rate in its filed tariff. The conspiracy to prevent the sale or lease of railroad docks was not an exercise of futility. Had private docks become established at the railroads' Lower Lake Erie facilities, the filed commodity line-haul rate would have been applicable to those private docks.

The ore docks which the Wills respondents attempted to lease/purchase had the rail "commodity line-haul" rates, not the "class" rates. The commodity line-haul rate serves *the dock*, as a geographic point.[7] If the conspiracy had failed, Wills' dock would have had the benefit of the commodity line-haul rates because the tariffs specified such rates from those particular geographic points.[8] It makes no difference *who* utilizes the dock—the dock itself receives the rail rate as a matter of law. *See Zenith Dredge Co. v. Northern Pacific Railway Co.*, 259 I.C.C. 288 (1944), *modified on other grounds*, 268 I.CC. 59 (1947).

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[7] For example, Wills attempted to lease the Toledo Lakefront dock. The railroads utilized the following tariffs for rail service at this Toledo dock: New York Central Railroad Company Freight Tariff 1501-G, Penn Central Company Freight Tariffs C-80, C-80-A and C-80-B, and Baltimore & Ohio Railroad Company Freight Tariff 160-F. *Each tariff contained iron ore commodity line-haul rates from "the ore docks of the Lakefront Dock and Railroad Terminal Company at Tolcdo, Ohio"* to Middletown and Hamilton, Ohio, and Ashland, Kentucky, which are sites of Armco steel mills. C.A. App. 10439, 10447-51. The same would be true of Wills' attempt to purchase the Hocking Valley dock property from the Chesapeake and Ohio Railway Company. This dock was served by C&O Freight Tariff 2152-M, and *contained an iron ore commodity line-haul rate applicable "from the ore docks of the Chesapeake & Ohio Railway Company at Toledo Dock, Ohio"* to Middletown and Hamilton, Ohio, and Ashland, Kentucky. C.A. App. 10449.

[8] If the railroads desired to restrict application of the iron ore line-haul rates, they should have so noted specifically in their tariffs. Indeed, the ICC has long held that "[i]f carriers desire to restrict application of certain rates named in their tariffs, they should do so in clear and unequivocal language." *Brainerd Fruit Co. v. Chicago G. W. R. Co.*, 163 I.C.C. 585, 586 (1930). *See also Armour & Co. v. Atchison, T. & S. F. Ry. Co.*, 291 I.C.C. 223, 231 (1953).

In *Zenith Dredge*, the Minnesota-Atlantic Transit Company and the Great Lakes Transit Corporation had cancelled their railroad dock leases, and the ICC ruled that the rail tariff rate from those docks remained available for other shippers. The ICC found that the description in the rail tariff, "Northern Pacific Railway, dock no. 1" and "Northern Pacific Railway, dock no. 6," represented the geographic points from which the rate applied, regardless of whether the party leasing the facility had changed. 259 I.C.C. at 289-290. If the railroads had not abruptly cancelled Wills' lease of the Toledo Lakefront dock on the day before it was to become effective,[9] or had the railroad permitted the lease of the Toledo Hocking Valley dock to go through (C.A. App. 3440), Wills' dock would have had the commodity line-haul rate. The above facts were established, and went absolutely uncontradicted, in pretrial briefs, at trial, and to the court of appeals. *See* Tr. Docket No. 563 at 2-3, C.A. App. 10447-10451; Wills Reply Br. at 1-3, respectively.

To eliminate the application of a commodity line-haul rate, a railroad had to file the new rate with the ICC under 49 U.S.C. § 6(1) (Appendix B), and the public is afforded the opportunity to protest the railroad's action. The railroad, not Wills, would need to initiate the proceeding.[10] B&LE's "class rates" argument raises an ICC jurisdictional issue not applicable under the proven facts.

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[9] *See* C.A. App. 4172-74, 8383, 8387, 8389-90. The railroads cancelled the lease and then continued developing the site to meet Armco's needs. Even today, the railroads continue to serve Armco from the site Wills attempted to lease for this purpose. C.A. App. 8546-61.

[10] Aside from the non-existence of an ICC rate issue, there also is no ICC issue concerning tariff construction. Construction of railroad tariffs is well within the jurisdiction of the Federal courts. *See Louisiana & Arkansas Ry. Co. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966) (Federal court has jurisdiction to construe the meaning of rail tariff term "shipping point.") *See also Durbin Paper Stock Co. v. ICC*, 585 F.2d 543 (D.C. Cir. 1978); *Calcium Carbonate Co. v. United States*, 256 F. Supp. 99 (S.D. Ill. 1966).

2. *Private Dock-Handling Charges Do Not Fall Within the ICC Rate-Making Jurisdiction*

Petitioner, B&LE, makes a second attempt to implicate rate-related activities into their conspiracy, claiming:

> The ICC had regulated both dock-handling rates and commodity line-haul rates for decades prior to the events at issue in this case . . . .
> [Petitioner then concludes that this Court permitted] establishing rates on a basis that favored railroad docks over privately owned, non-railroad docks, and in applying full dock-handling charges to all shippers, even if shippers provided part of the unloading service themselves. *United States v. ICC*, 352 U.S. 158, 173-174 (1956).

Pet. 4-5.

Petitioner appears to allege that the railroads would have been able to apply dock-handling charges even where Wills performed the dock-handling service, and that private docks are subject to ICC regulation. If so, both allegations are false.

a. *Railroads could not apply dock-handling charges at Wills respondents' private dock*

Petitioner's reliance on *U.S. v. ICC*, *supra*, is simply wrong. In *U.S. v. ICC*, the Court interpreted a rail tariff that published a combined commodity line-haul rate and the dock-handling charge as a single rate. ("The railroads assume these [wharfage and handling] charges as a part of the rate.") *Id.* at 160. The government had paid the full commodity line-haul rate, then sought a rebate for the wharfage and handling services it performed. The Court rejected the government's argument, finding that any deviation from the filed rail tariff rate would be a violation of the Interstate Commerce Act. *Id.* at 172. The decision simply followed the well-established, filed-rate doctrine. *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

Unlike the rail tariff interpreted by the Court in *U.S. v. ICC*, the commodity line-haul rates here do not include dock-handling charges. Indeed, in the *Iron Ore Rate Cases*, 41 I.C.C. 181 (1916); 44 I.C.C. 368 (1917), the ICC required the railroads serving the Lake Erie iron ore market to separately state dock-handling charges from the line-haul rates in their tariffs. 41 I.C.C. at 221.[11] The rail tariffs applicable to the docks Wills attempted to lease/purchase contained separately stated charges for dock-handling services. *See* C.A. App. 10465-66, 10441, 10446.[12] Where the line-haul rates and dock-handling charges are separate, a railroad cannot apply its dock-handling charges if it is not performing this service. *See A.F. Pringle & Co. v. Atlantic Coast Line R. Co.*, 269 I.C.C. 541, 546 (1947); *Handling Freight Between Ships and Cars at Ports*, 253 I.C.C. 371 (1942).

b. *Wills respondents' private dock would not be subject to ICC regulation*

Finally, contrary to the implication left by the B&LE, the dock-handling charges applicable to Wills' private dock was not, and could not have been, subject to ICC regulation. The Interstate Commerce Act grants the ICC jurisdiction over rail common carriers. Dock companies that conduct rail operations, under the common control of, or pursuant to a contract with, a rail common carrier, and, hold their dock services out to the public at large in

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[11] Petitioner's own tariffs were changed to comply with this requirement. In Petitioner's 1917 iron ore tariff, line-haul rates and dock-handling charges were published together. C.A. App. 6419, 6420. Petitioner's iron ore tariff in effect from 1958 separately published line-haul rates and dock-handling charges. C.A. App. 6588.

[12] For example, the Chesapeake & Ohio Railway Company's Hocking Valley dock at Toledo, Ohio, Tariff 2152-M, Item 130, and Supplements thereto, and after May 1979, Tariff CO 4980, Item 200, and Supplements thereto, clearly designate separate commodity line-haul rates and handling charges. This issue is not in dispute, as the separate rate structures are described in Petitioner's opening brief to the court of appeals. Appellate Br. at 7-8.

combination with the rail common carrier, are also subject to rail common carrier status. *Association of P&C Dock Longshoremen v. The Pittsburgh & Conneaut Dock Company,* 8 I.C.C.2d 280; 1992 ICC LEXIS 27 (1992); *Lone Star Steel Company v. McGee,* 380 F.2d 640 (5th Cir. 1967); *Kieronski v. Wyandotte Terminal Railroad Co.,* 806 F.2d 107 (6th Cir. 1986). In *P&C Dock,* the ICC held:

> Our jurisdiction over rail carriers is limited to common carriers. What distinguishes common from private rail carriage is public access—'the right of the public to use the roads' facilities and to demand services of it.' *Lone Star,* 380 F.2d at 648 (additional citations omitted) . . . thus, the operations of private rail carriers or private contract carriers fall outside the Commission's jurisdiction.

1992 ICC LEXIS at *27.

The ICC found *P&C Dock* a rail common carrier, stating:

> It is not disputed that B&LE publicly offered P&C dock's rail-lake vessel loading and unloading services at Conneaut as part of its complete common carrier rail transportation service, compensated through B&LE's publicly filed tariff.

Id., at *29.

Under the criteria set out in *P&C Dock,* and its analysis of cases cited therein, Wills' dock unquestionably would not have been a rail common carrier. Wills' dock was not under common control with a rail common carrier and had no contract for serving the railroads' customers. Moreover, Wills' dock operations were not accessible for the public "to demand services of it." *Id.* As specifically found by the court of appeals, "Armco's business was the sole evidence of property injury to Wills. Thus, Wills' claims were tied to its ability to serve a specific customer . . ." Pet. App. 82a. The record below is absolutely clear on this point. Wills' proposed ore dock was

not held out to the public, rather it had one purpose—to serve one customer, Armco. C.A. App. 10444, 10452, 3456-78. The court of appeals properly found the private docks were "unregulated entities." Pet. App. 34a. If B&LE is arguing that railroad handling charges are applied at private docks or that the ICC regulated private docks, then its claims are simply not supportable under the law as applied to the facts of the case.

Consequently, B&LE's position that it eventually could have thwarted competition from Wills even if its non-rate-related conspiracy had failed is simply inconsistent with the evidence introduced, and not contested, at trial. The Wills respondents were indisputedly capable of offering a lower cost dock-to-mill service than any complete dock-to-mill service provided by the railroads. C.A. App. 10465-67. The conspiracy prevented Wills from acquiring a dock in Toledo to serve Armco, and if the conspiracy had failed, no ICC decision was necessary before Wills could compete for Armco's ore traffic.

3. Wills Trucking, Inc.

B&LE ignores the fact that Wills had the capability of trucking Armco's ore from the dock. If Armco required, Wills had the authorities (C.A. App. 3464-69, 6436, 10444, 7152-53, 6649-50, 7710-12, 7716-31, 7888-7906, 7794-7824), and the rates (C.A. App. 7475-79) to move Armco's ore.

C. District Court Proceedings

Without recognition of the many varied claims and burdens applicable to the many respondents in the nine consolidated cases, B&LE claims: "The case was tried largely on proof of two elements, i.e., that the railroads conspired to maintain high class rates for 'private docks' and to maintain high rates for dock handling to discourage the use of self-unloading vessels." Pet. 6. This statement ignores the facts alleged, and proved, in Wills' exclusively non-rate-related case.

The Wills respondents' Amended Complaint alleged antitrust damage caused by Defendants "concertedly refusing to permit Plaintiffs and others by lease, sale or other means to establish or operate private docking facilities on land owned or controlled by Defendants." C.A. App. 443 at ¶ 16b. Wills' claims were tried to the jury on proof of the railroads' concerted refusals to lease or sell dock property unrestricted to the handling of iron ore. C.A. App. 10442 and 3437-60. The district court thoroughly charged the jury on the Plaintiffs' burden in establishing a concerted refusal to sell or lease dock properties. C.A. App. 4963-64, 4969-71, 4979, 4988, 4995-97. The jury thereafter rendered a special verdict finding injury to Wills' dock company caused solely through "the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio." C.A. App. 1900. This injury, resulting from the refusal to sell or lease dock properties, is "outside the scope of the *Keogh* doctrine." *Pinney Dock,* 838 F.2d at 1457.

D. The Decision of the Court of Appeals

B&LE theorizes, "Had the Court of Appeals enforced these [*Keogh*] limitations, as [did] the Sixth Circuit in . . . *Pinney Dock* . . . the damages in this case would have been zero." Pet. 2. To the contrary, *Pinney Dock* expressly held that the *Keogh* doctrine has no applicability to the "refus[al] to permit [plaintiff] to purchase, lease or use dock facilities which could have accommodated the technologically advanced self-unloading vessels . . ." 838 F.2d at 1457. Therefore, the decision below is entirely consistent with *Pinney Dock.* The court of appeals below stated:

> It is fully consistent with *Keogh,* however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, *particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors,* the railroads ef-

> fectively retarded entry of lower cost competitors to the market . . . [adding] We have definite evidence of the railroads' refusal to handle self-unloaders at their docks, restrictions on the *sale and lease of dock property* to unregulated entities, boycotts of unregulated docks. [sic] and intra-industry coercion claims which *mirror* those deemed by the court of appeals in *Pinney Dock* to escape *Keogh*.

Pet. App. 32a, 34a (emphasis added).

There is no conflict: the concerted refusal to sell or lease dock properties constitutes non-rate activities outside the scope of the *Keogh* doctrine.

COUNTERARGUMENT

I. *KEOGH*

The jury conclusively determined that the cause of Wills' injuries were the result of Petitioner's "refusal to lease or sell dock properties without restrictions . . ." C.A. App. 1900. Petitioner admitted to the court of appeals, "The Wills plaintiffs . . . claims were based exclusively on conduct unrelated to rates—i.e., the railroads' alleged refusal to sell or lease railroad property for use as dock facilities," thus making *Keogh* wholly inapplicable. Appellant Br. at 14 (Appendix A).

B&LE places very heavy emphasis on the Sixth Circuit's decision in *Pinney Dock*, repeatedly claiming that "striking conflicts" exist between the Third Circuit's opinion here and the Sixth Circuit's *Pinney Dock* decision. *See* Pet. 2, 6, 8, 9, 11, 14-15, 16-17. In reality, the decisions are uniform in many respects, including those relating to the key element of Wills' claims. In *Pinney Dock*, the Sixth Circuit acknowledged that:

> [A]t least some of the plaintiffs' claims for antitrust damages appear to be outside the scope of the *Keogh* doctrine. [One plaintiff] contends that the defendants refused to permit [that plaintiff] to purchase, lease

> or use dock facilities which could have accommodated the technologically advanced self-unloading vessels . . . . These allegations are plainly not related to the defendants' handling charges or to the commodity line-haul rate applied from [the dock] and, to that extent, *Keogh* would not bar antitrust claims based on such allegations.

838 F.2d at 1457.

Pinney Dock properly characterizes refusals to sell or lease dock properties as being non-rate-related. Thus, there is simply no conflict in the circuit courts concerning the inapplicability of *Keogh* to the Wills respondents' claims.[13]

II. *ILLINOIS BRICK*

Petitioner, B&LE, does not address its *Illinois Brick* argument to the dock or trucking company cases, instead, limiting its argument to actions of certain steel companies (Pet. App. 22-24), and therefore, Wills respondents do not respond to this argument.

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[13] Petitioner asks this Court to also consider whether *Keogh* should be applied to "bar competitors' rate-based claims . . ." Pet. 10. Petitioner cites only the *Pinney Dock* decision for its conclusion that "the lower courts remain badly divided over whether *Keogh* applies to competitor claims." Pet. 17. By contrast, the Second, Third, Eighth and Ninth Circuits have long held *Keogh* inapplicable to competitor claims. Pet. App. 36a. Nevertheless, this issue also presupposes rate-based activity simply not present here.

CONCLUSION

B&LE's Petition for Certiorari seeking review of Case 91-1587 (D.C. Civil No. 84-02010) involving Respondents, Toledo World Terminal, Inc. and its corporate affiliate, Wills Trucking, Inc., should be denied, as their claims were clearly based on conduct unrelated to rates, as the Petitioner has unconditionally admitted before the court of appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

Excerpt from Page 14 Brief of Appellant in the United States Court of Appeals for the Third Circuit Dated November 4, 1991

trebling) to eight of the nine plaintiffs as to which liability had been found for damages they allegedly sustained between 1968 and 1983. The damages jury awarded only nominal damages ($1 each) to the Wills plaintiffs, the only prevailing plaintiffs whose claims were based exclusively on conduct unrelated to rates—*i.e.*, the railroads' alleged refusal to sell or lease railroad property for use as dock facilities. By far, the largest damages ($603.3 Million) were awarded to the steel company plaintiffs, almost 70% of which were based on claims for so-called lost "lake-freight savings"—*i.e.*, savings the steel companies claimed they would have realized in their dealings with vessel companies but for the railroads' conspiracy.

APPENDIX B

49 U.S.C. § 6(1)

Section 6. Schedules and statements of rates, etc., joint rail and water transportation.—(1) Schedule of rates, fares, and charges; filing and posting.—Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have ben established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facili-

ties defined in this chapter. (Feb. 4, 1887, c. 104, sec. 6, 24 Stat. 380; Mar. 2, 1889, c. 382, sec. 1, 25 Stat. 855; June 29, 1906, c. 3591, sec. 2, 34 Stat. 586; Feb. 28, 1920, c. 91, sec. 409, 41 Stat. 483.)

No. 93-643

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition, B&LE urged review by this Court of two vital issues concerning the proper construction of § 4 of the Clayton Act, *viz.*, whether rates filed in ICC-regulated tariffs can ever serve as the basis of antitrust injury asserted by shippers and competitors against a railroad and whether, contrary to the express holding of the Third Circuit below, the "indirect purchaser" rule is "a strict prohibition against recovery by indirect purchasers," Pet. App. 50a n.21. Contrary to the impression respondents Republic Steel Company, *et al.*, seek to create (Opp. 14), the questions presented are not "fact intensive." Respondents' recitation of the record below says something about their litigating style but nothing about each "question of law" that the court of appeals decided (Pet. App. 26a (*Keogh*); Pet. App. 42a (*Illinois Brick*)). Petitioner does not question in this Court any of the facts underlying the two central errors of law, and respondents' lengthy discussion of the facts cannot conceal the extraordinary holdings below that subject an antitrust defendant to liability in excess of $660 million even though two separate doctrines directly preclude the plaintiffs from establishing any "injury" within the meaning of the antitrust laws.

1. Respondents' attempt to distinguish this case from *Keogh* and *Square D* is unavailing. Although they repeatedly suggest that the district court eliminated rates and rate-related conduct from the trial of this case, respondents cannot escape the question decided below: "Does *Keogh* . . . preclude treble damage recovery for private litigants claiming . . . ICC-approved rates *played a role* in thwarting market entry[.]" Pet. App. 29a (emphasis added). Thus, whether rates were the sole cause of the damages claimed by respondents (as petitioner says), or were the primary cause (as the courts below found), or merely "played a role" (as Republic conceded below but disavows now), damages inflicted by tariff rates cannot, as a matter of law, constitute "injury" under § 4 of the Clayton Act. See Jt. Br. of Appellees 39; Pet. App. 29a.[1]

[1] Ambrosia's description (Opp. 5-6) of the conspiracy repeatedly identifies rate setting as a significant, if not the primary means, of

As both courts below found, the conspiracy was effectuated by two aspects of the rates agreed upon by the railroads:

> "[C]harging the same rate for unloading a self-unloader as for unloading a bulker" (*id* at 51a-66a) and
>
> "refusing to approve commodity line haul rates from private docks which would have handled self-unloaders [and thus leaving in effect higher class rates for such docks]" (*id.* at 51a).[2]

No amount of self-serving denial by respondents enables them to escape what the courts below found and accepted for purposes of deciding the legal issues: the means by which the conspiracy inflicted the injuries complained of were rates contained in tariffs filed with the ICC. See Pet. App. 51a & 93a-94a.[3]

Although the court of appeals steadfastly refused to use the term "rates" in its *Keogh* analysis, except in describing the question presented, it revealed the true nature of the case repeatedly when it described the facts generally and responded to petitioners' non-*Keogh* issues. See, *e.g.*, Pet. App. 18a (railroads "agreed to refuse to provide competitively-priced inland rail services, *i.e.*, to publish commodity line haul rates for moving ore from

---

implementing the conspiracy. Of course, the disposition of the Wills' claims proves petitioner's argument that rates were the sole means of injuring respondents: Wills claimed injury only from the railroads' refusal to sell or lease dock property, and the jury awarded Wills only one dollar.

[2] To illustrate, respondent Erie complained that "refusal of a line-haul rate to Erie [of $5.01 per ton] was the same as a complete refusal of service" because the class rates of $13.20 for the same distance "were prohibitively expensive" (Erie Brief at 3 n.5).

[3] Respondents' reliance on *United States* v. *B&LE*, 717 F.2d 593 (D.C. Cir. 1983), is entirely misplaced. Because *Keogh* does not apply to criminal antitrust actions, the D.C. Circuit had no occasion to discuss the decision, nor any reason to focus on the extent to which the defendants effectuated their conspiracy through tariffed rates.

such docks"); *id.* at 51a (railroads "refus[ed] to approve commodity line haul rates from private docks which would have handled self-unloaders"); *id.* at 66a ("the railroads' refusal to alter their rates"); *id.* ("denial of competitive rates for inland rail transport from private docks").

In light of the rate-related nature of respondents' claims below, it is irrelevant whether their damages were or were not measured by reference to hypothetical railroad rates. *Keogh*'s fundamental holding—that the filed rate is the legal rate and so cannot cause antitrust injury—required that their treble damage claims be dismissed insofar as respondents relied on tariff rates, regardless of how respondents sought to measure their damages.[4] Indeed, in *Pinney Dock*, the Sixth Circuit rejected the essentially identical claim that *Keogh* applies only where the plaintiff seeks a "rebate," not where "plaintiffs claim damages for loss of business." 838 F.2d at 1455.

Finally, in *Square D*, this Court rejected the very same effort to limit *Keogh* to its facts that respondents make here. There, as here, plaintiffs alleged a conspiracy to eliminate competition that included non-rate activity, such as coercion, to foreclose independent action. In stark contrast to the court below, however, this Court held that, under *Keogh*, rates could not form the basis of any liability for treble damages and that all rate-related claims had to be excised from the case.

2. The suggestion by respondents and the court below that this case involved non-rate conduct that the Sixth Circuit deemed outside the scope of *Keogh* is demon-

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[4] Republic wrongly asserts (Opp. 25 n.17) that the Valentine Act claims are not implicated by the petition. *Keogh* bars state law claims as well as Sherman Act claims. *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 371 (1988). Thus, reversal on *Keogh* would affect all of respondents' claims—state and federal. Moreover, the district court specifically held that the Valentine Act claims were dependent upon *Illinois Brick*. J.A. 2349. Thus, if the Court holds the federal claims barred, the district court will vacate the state claims as well.

strably wrong. As noted, the "boycotts" and "refusals to deal" that respondents and the court below describe for purposes of their *Keogh* analyses were in fact offers to provide and the actual provision of services under tariffed rates that respondents claim were too high. The Sixth Circuit very explicitly held that "boycotts" and "refusals to deal" of this nature fall *within Keogh*'s bar.[5] In *Pinney Dock*, the Sixth Circuit noted plaintiffs' contention "that defendants refused to handle self-unloading vessels at docks owned or operated by defendants and that defendants boycotted Pinney Dock," and explained that, "*if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of Keogh.*" 838 F.2d at 1457-58 (emphasis added).

The fact that the procedural posture of this case, which went to full trial, is different from that in *Pinney Dock*, where the Sixth Circuit reviewed a summary judgment decision, is irrelevant.[6] Not only were the courts in both cases required to view the evidence favorably to the antitrust plaintiffs, but here, as the Third Circuit itself elsewhere acknowledged, the evidence at trial *confirmed* that the alleged "boycotts" and "refusals to deal" took the

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[5] Respondents' reliance on the jury instruction that precluded measuring damages solely on the basis of excessive rates does not undermine the *Keogh* issue; to the contrary, it graphically reveals the difference between the *Pinney Dock* holding and the decision below. The whole point of *Pinney Dock* was that antitrust plaintiffs cannot simply reframe their rate-based claims in "boycott" terminology and recover under *Keogh*. Here, the jury was instructed that jointly setting rates is a boycott and that boycotts are illegal under the antitrust laws. That jury instruction is manifestly invalid under *Pinney Dock*.

[6] The interlocutory posture of the case is, however, very relevant to why the Court did not grant certiorari in *Pinney Dock*. Moreover, the prediction made by the respondents then that these issues would not recur was obviously mistaken, as this case, *Lifschultz*, the RICO cases cited in the petition (at 19 n.12), the price squeeze cases cited in the petition (*id.* at n.13), and the *amicus* participation of the AAR and the NMFTA plainly reveal.

form of assessing higher rates. The conflict between the decisions of the Third and Sixth Circuits, therefore, could not be starker. The recent decision in *Lifschultz* merely reinforces the need for review of this issue.

3. Recognizing that the decision below conflicts directly with the Sixth Circuit's holding that *Keogh* applies to competitor claims, respondents attempt to dismiss *Pinney Dock* as wrong. This attempt to cast the decision in *Pinney Dock* as an outlier is utterly mistaken. Except for the decision below, the "weight of authority" respondents cite all pre-dates this Court's express affirmation of *Keogh* in *Square D*. Since that time, three courts have addressed the question whether *Keogh* applies to competitor claims. Two have concluded that it does; only the court below has held that it does not.

The Sixth Circuit's decision is correct. *Keogh*'s and *Square D*'s rationale is in no way limited to shipper claims. To the contrary, this Court explained that it is the Interstate Commerce Act, not the antitrust laws, that determines whether an ICC-regulated rate is legal or not. There is thus no reason to limit *Keogh* to shippers, particularly in view of the fact that competitors as well as shippers can challenge rates before the ICC and, if successful, can recover damages. In fact, limiting *Keogh* to shippers would pervert the purpose of the antitrust laws by providing greater protection to competitors than to customers, who are the intended beneficiaries of the competition the antitrust laws are designed to promote.

In refusing to follow the decision in *Pinney Dock*, the Third Circuit did not address any of the policy reasons the Sixth Circuit identified for applying *Keogh* to competitor claims, and instead limited itself to disagreeing with the Sixth Circuit's reading of *Georgia*. See Pet. App. 36a-37a n.6. Respondents' contention that the Third Circuit's reading is correct ignores a more fundamental point: the very fact that two courts of appeals have read a decision of this Court in support of diametrically opposed results in connection with identical facts underscores the need for review and clarification of the law.

4. As petitioner has previously explained, notwithstanding passage of the Staggers Act, substantial rail and trucking traffic continues to move pursuant to tariffs on file with the ICC. Indeed, for that reason, organizations representing both of these industries have filed *amicus* briefs urging this Court to review the decision below. Moreover, respondents themselves acknowledged in their pleadings below that "*Keogh* has consistently been a guide to analysis in a broad array of regulatory regimes," including those established by the Federal Communications Act and the Federal Power Act. Jt. Br. of Appellees 47 & n.31. Thus, respondents' self-serving assertion that the problem addressed by *Keogh* will not arise in the future provides no basis for the Court to ignore the conflict in the circuits on this important issue.[7]

5. Respondents make virtually no effort to defend the holdings of the court of appeals that *Illinois Brick* has been superseded by *AGC* and that *Utilicorp* can be "discount[ed]" as a mere public utility case. Indeed, respondents do not challenge the fact that the steel companies were awarded $414 million solely on the pass-on theory that, but for the conspiracy, the steel companies would have paid less to *vessel* companies for *lake* freight transportation than they in fact paid to vessel companies. Even the court of appeals recognized that the steel companies were indirect purchasers as to these damages. See Pet. 6-7; Pet. App. 50a. The harm to the indirect purchaser rule is manifest and uncontested.

Instead of addressing their status as indirect purchasers, respondents assert that *Illinois Brick* does not apply to

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[7] Nor is it true, as Republic asserts (Opp. 21) that the Staggers Act significantly undermines the rationale of *Keogh*. This Court rejected precisely this argument in *Square D*, where the Government urged that *Keogh* be expressly overruled. The fact that, within the past five terms, this Court has granted review in no fewer than three cases involving the filed rate doctrine (of which *Keogh* is a part) underscores the doctrine's continuing vitality. *See Security Serv., Inc.* v. *K Mart Corp.*, No. 93-284 (*cert. granted*, Oct. 18, 1993); *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990).

dock handling damages in this case because the steel companies—"as indirect purchasers of the railroads"—were directly injured by the railroads' conspiracy. Republic Opp. 25-26. In making this argument, respondents are playing a shell game. Thus, in an effort to escape *Keogh/Square D*, respondents characterize the railroads' conduct as a refusal to deal and a boycott in order to obscure that this is a rate case. Then, when trying to escape the *Illinois Brick* prohibition on pass-through damages, respondents flip their position by claiming that they were directly injured because they were forced to pay excessive dock handling rates to the railroads.

The steel company respondents' pass-through damage theory concocted to evade *Keogh* runs them square into *Illinois Brick*.[8] Only by ignoring the *Keogh* problem can respondents argue that this is a case, like *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), where more than one party suffered direct injury, and so is distinguishable from *Illinois Brick*. Not only is the respondents' reliance on *Blue Shield* v. *McCready* misplaced, it actually illustrates why the steel companies' claims are indirect. In *McCready*, the Court held that *Illinois Brick* did not bar the damages claim of a subscriber against Blue Shield because "her injury consists of Blue Shield's failure to pay her." 457 U.S. at 475. Because plaintiff was seeking to recover for funds owed and payable to her directly by Blue Cross, there "was not the slightest possibility of a duplicative exaction from petitioners." *Id.*

Here, by contrast, the only injury for which the steel companies have been awarded damages are for savings

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[8] *See* Republic Opp. App. 17a-18a: "I also note my firm belief that these damages are actually claims for overcharge in other clothing. Although plaintiffs claim to be seeking recovery for 'lost savings,' this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices; while this brings plaintiffs out from under the constraints of *Illinois Brick* (i.e., they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*."

lost from transactions with non-parties. It is obvious that —absent the kind of massive proceeding with mandatory joinder of parties and complex apportionment that *Illinois Brick* condemned—there is no way to prevent an overlap between the lost "savings" that the steel companies claim the vessel and dock companies would have passed on to them, and the "lost profits" that the dock and vessel companies have claimed they would keep for themselves. Because the possibility for duplicative damages is "real" (Pet. App. 52a), it is *Illinois Brick*, and not *McCready*, that controls.[9]

Finally, there is no merit in respondents' related claim that, if *Illinois Brick* is applied to bar their damages, then "no injured party has standing to sue." Republic Opp. 27. As respondents elsewhere admit, *Illinois Brick* does not stand as a bar to the claims of competitors—vessel and dock companies—who can and have claimed lost profits from being denied the opportunity to participate in a transportation system based on self-unloaders. See Pet. 23-24 & n.15. Petitioner's point is simply that the steel companies should not be permitted to escape *Keogh* by concocting damages theories in their capacity as purchaser of services from non-railroad entities.

6. Respondents also assert that the court of appeals held only that *Illinois Brick* was inapplicable to these facts, not that the need to show antitrust injury under *Illinois Brick* has been superseded by the standing analysis of *AGC*. Republic Opp. 27; Ambrosia Opp. 27. What-

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[9] Contrary to respondents' argument (Republic Opp. 24), the Sixth Circuit did not hold in *Pinney Dock* that the steel companies were the directly injured parties for purposes of the lost savings damages at issue here. There, the court of appeals held only that the vessel and dock company plaintiffs lacked standing under *AGC* to pursue some of their rate-related claims because—as to *those* claims—the steel companies were more directly injured. 838 F.2d at 1462-64. The court of appeals *permitted* the vessel and dock companies to proceed on their other claims, *including* the claim that they lost profits as a result of the delay in the introduction of self-unloaders. *Id.* at 1452, 1465.

ever else may be said about the decision below, there is no question that the court of appeals recognized that the steel companies sought relief as "indirect purchasers" but refused to apply *Illinois Brick* to them:

> We agree with the district court and B&LE that the steel companies, in respect to lake transport damages, are, in some sense, "indirect" purchasers. Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claims, this conclusion is not supported by the current law. We are, instead, instructed by *AGC* to ascertain the nature of the relationship between the parties.

Pet. App. 50a; see also *id.* at 50a n.21. Thus, although the Third Circuit conceded that the steel companies sought relief as indirect purchasers, it simply declined *as a matter of law* to consider, under *Illinois Brick*, whether respondents had suffered antitrust injury; instead, the court held that respondents needed only to establish standing under *AGC*. *Id.*; see also Pet. App. 48a. The decision below thus squarely puts in issue the continuing vitality of the *Illinois Brick* ban on recovery of treble damages by indirect purchasers and the question of whether *Utilicorp*'s flat ban on indirect purchaser claims can be "discount[ed]" as limited to "the public utility arena." Pet. App. 50a n.21. The Third Circuit's conclusion that standing analysis under *AGC* has superseded the need to show antitrust injury should be reviewed by this Court because it conflicts with other appellate decisions and exacerbates the "great deal of confusion" in the courts of appeals over the relationship between standing and antitrust injury. *Greater Rockford Energy & Technology* v. *Standard Oil Co.*, 988 F.2d 391, 394-95 (7th Cir. 1993). Respondents do not even address this conflict.

This case illustrates why a standing analysis is no substitute for a determination whether plaintiff is seeking treble damages for antitrust injury. In requiring courts to balance several factors, *AGC* provides courts with substantial discretion to determine standing once an antitrust injury has been found; by contrast, *Illinois Brick* and

Utilicorp establish a bright-line rule that plaintiffs may not recover treble damages for injuries suffered as indirect purchasers. See Pet. 20-22.[10] By considering the *Illinois Brick* "concerns" only as part of a multi-factor balancing analysis, the court of appeals was able to "balance away" facts that demonstrate that the steel companies recovered damages only as indirect purchasers. See Pet. 28-30.[11]

Contrary to respondents' assertion (Ambrosia Opp. 26), courts have repeatedly applied *Illinois Brick* to bar claims for recovery of savings that a party other than defendant would have provided. For example, the conflict with *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991), a case that none of the respondents even cite, is stark because there the court refused to allow a shipper to recover lost savings that a (co-plaintiff) rail carrier allegedly would have passed on if the defendant had granted that carrier trackage rights. Review by this Court is therefore warranted to resolve that conflict plus the conflict with this Court's decisions in *Illinois Brick* and *Utilicorp*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] Respondents contend that each of them zealously avoided presenting overlapping damage claims, but they ignore completely the overlap between their claims and those of Pinney Dock and the Litton vessel company at issue in the Sixth Circuit. Respondents make no effort to defend the court of appeals' holding that the hypothetical ability to avoid duplication of recovery is sufficient to ignore *Illinois Brick*. That silence is telling; the holding below clearly violates the core purpose of the indirect purchaser rule of avoiding complex and overlapping recoveries in private antitrust cases. *See* Pet. 23 & n.14.

[11] Respondents halfheartedly assert that the court of appeals preserved an alternative ground for affirmance of the district court's ruling that the steel companies would have entered the market for self-unloaders. In fact, as the court of appeals made plain, the district court's "preparedness" theory cannot serve as an alternative ground because there is no evidence in the record, nor is there a jury instruction, that supports such a theory. Pet. App. 44a n.15.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Association of American Railroads (AAR) hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file the accompanying brief as *amicus curiae* in support of petitioner.[1]

AAR is a voluntary, not-for-profit incorporated trade association of the Nation's railroads. AAR's members operate approximately 76 percent of the line haul mileage, employ approximately 90 percent of the workers, and produce approximately 91 percent of the freight revenues of all railroads in the United States.[2] On mat-

[1] Petitioner and respondents Tauro Brothers Trucking Company, CD Ambrosia Trucking, Erie Western Pennsylvania Port Authority, and Codan Corporation have consented to the filing of this brief. The remaining respondents have not.

[2] A list of AAR's members appears in the attached Appendix. Petitioner Bessemer & Lake Erie Railroad is an associate member of AAR.

ters of concern to the railroad industry, AAR represents its members before courts, agencies, and the Congress.

Central to this case is the proper scope of this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), a decision expressly reaffirmed in *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). The railroad industry has a longstanding interest in the vitality of the *Keogh* doctrine, which bars treble damage claims that are based on rates filed in tariffs with federal or state regulatory agencies. Although the doctrine has been applied in a wide variety of regulated industries, *Keogh* itself involved a treble damage claim against a railroad based on its tariff rates filed with the Interstate Commerce Commission (ICC). Moreover, AAR has participated extensively as an *amicus* in cases in which the *Keogh* doctrine was at issue. For example, AAR was granted leave to file a brief as *amicus curiae* in this Court supporting the *Keogh* doctrine in *Square D*, and AAR filed *amicus* briefs before the panel and in support of rehearing en banc in the Third Circuit in this case.

The Third Circuit's decision here presents issues of substantial continuing importance to the railroad industry as a whole. The regulatory scheme was altered by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 11 U.S.C., 45 U.S.C., and 49 U.S.C.). Nevertheless, many rates remain subject to Interstate Commerce Commission authority,[3] and significant volumes of railroad traffic nationwide continue to move under ICC-regulated tariffs. Moreover, as interstate common carriers, AAR's member

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[3] Rail traffic not exempted from statutory requirements by the ICC and not governed by contracts as provided under the Staggers Act remains subject to numerous tariff requirements. 49 U.S.C. §§ 10505, 10713, 10762. Likewise, the ICC retains extensive regulatory authority over tariff rates as to which it finds the existence of "market dominance." *Id.* § 10709.

railroads do business in each of the federal judicial circuits. Accordingly, AAR has a significant interest in this Court's resolving the confusion among the circuits as to the scope of the *Keogh* doctrine, which makes the potential liability of AAR's members for treble damages depend on the circuit in which a plaintiff chooses to bring suit.

In the attached brief, AAR addresses the issues raised by this case from the perspective of the railroad industry as a whole, emphasizing the relationship between *Keogh* and the filed rate doctrine, which this Court reaffirmed in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). AAR believes that this broader context would be useful for this Court in deciding whether review is appropriate in this case.

Accordingly, AAR respectfully requests that the Court grant AAR leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

The Association of American Railroads as *amicus curiae* will address the following question:

Whether the court of appeals correctly held that this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), reaffirmed in *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), is inapplicable in the following two situations:

> where tariff rates are the primary but not the exclusive means of precluding market entry by competitors, and
>
> where competitors of the defendant, rather than shippers, are the antitrust plaintiffs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-643

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

STATEMENT

Petitioner is one of several railroads alleged to have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by conspiring to restrain trade in the transportation and unloading of iron ore along Lake Erie. Respondents—steel company rail shippers, competing trucking firms and dock owners—alleged that petitioner conspired with other defendants to delay use of self-unloading vessels on Lake Erie by (1) charging artificially high dock handling rates for self-unloaders in ICC-filed tariffs; (2) re-

fusing to publish competitive line haul rates from private docks to steel mills and instead offering only ICC-filed "class rates," which were much higher; and (3) refusing to sell or lease property that could be used as docks for self-unloading vessels. Pet. App. 19a. The claims against all of the defendants, except petitioner, were dismissed or settled before or during trial. The liability jury found for respondents, and the damages jury awarded damages, after trebling and with interest, of over $660 million.

Petitioner moved for judgment notwithstanding the verdict, arguing, *inter alia*, that the claims were barred by *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), because they were based on rates contained in tariffs filed with the ICC. The district court denied petitioner's motion, and the Third Circuit affirmed. The court of appeals acknowledged that in the conspiracy alleged in this case, "ICC-approved rates played a role in thwarting market entry." Pet. App. 29a. Indeed, the court made clear that the jury's verdict was based on evidence that steel company officials were interested "in investing in the more cost-effective self-unloaders but that they were discouraged from doing so by the railroads' refusal *to alter their rates* to make the system economical." *Id.* at 66a (emphasis added).

Nevertheless, the court of appeals held that *Keogh* did not bar respondents' treble damage claims here. First, the court held that the claims by the competing trucking companies and dock owners were "not impacted by the *Keogh* rule" because *Keogh* does not bar antitrust claims brought by competitors. The court acknowledged, however, that its holding to that effect conflicted with the Sixth Circuit's decision in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). *See* Pet. App. 36a. Second, the court of appeals concluded that the claims of the steel company shippers also were not barred by *Keogh*. The court reasoned that the alleged conspiracy in this case

was one to "preclude competition" by "lower cost competitors," to which *Keogh* did not apply. *Id.* at 29a, 32a.

REASONS FOR GRANTING THE WRIT

Both aspects of the Third Circuit's decision that *Keogh* is inapplicable to this case are worthy of review.

First, the court of appeals' decision that *Keogh* does not bar treble damage suits brought by competitors exacerbates an acknowledged conflict among the circuits on this important issue. Pet. App. 36a; *see also Lifschultz Fast Freight, Inc.* v. *Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir. July 6) (summarily affirming district court decision that *Keogh* bars competitors' actions), *petition for cert. filed*, 62 U.S.L.W. 3289 (U.S. Oct. 4, 1993) (No. 93-549).

Second, the Third Circuit's recognition of an exception for conspiracies to "preclude competition" by "lower cost competitors," Pet. App. 29a, 32a, conflicts directly with the Sixth Circuit's decision in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), and creates an exception that threatens to swallow the *Keogh* rule.

These are issues of exceptional and continuing importance. Substantial volumes of rail traffic travel under tariffs and potentially are affected by the court of appeals' decision. Indeed, the frequency with which this Court in recent terms has revisited the filed rate doctrine, of which *Keogh* is an application, itself demonstrates the continuing importance of the issues presented by this case. *See Security Serv., Inc.* v. *K Mart Corp.*, 996 F.2d 1516 (3d Cir.), *cert. granted*, 62 U.S.L.W. 3287 (U.S. Oct. 18, 1993) (No. 93-284); *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990).

The Third Circuit's decision here unduly expands the potential treble damage liability of the railroad industry

and results in interstate railroads being subjected to varying treble damage exposure depending on the circuit in which the suit is brought. This Court should grant review to ensure the uniform interpretation of the federal antitrust laws on this important question.

THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO CONSIDER THE PROPER SCOPE OF *KEOGH*'S BAR ON TREBLE DAMAGE CLAIMS BASED ON FILED RATES.

The Third Circuit's holding that *Keogh* has no application to treble damage claims brought by competitors, rather than by customers, warrants review by this Court. That holding adds to an acknowledged conflict among the circuits on the issue and is contrary to this Court's decisions. Moreover, it subverts the fundamental purpose of the antitrust laws by providing greater protection for competitors of an antitrust defendant than for its customers.

The circuits are sharply split on the applicability of *Keogh* to claims by competitors. In support of its decision here that *Keogh* does not apply to competitors' claims, the Third Circuit relied on decisions by the Second, Eighth, and Ninth Circuits, as well as a prior Third Circuit case. Pet. App. 36a. The Third Circuit expressly acknowledged that its decision was in conflict with the Sixth Circuit's decision in *Pinney Dock*, which held that *Keogh* bars competitors from bringing treble damage claims. *Id.*

In *Pinney Dock*, the Sixth Circuit found no reason to distinguish competitors from customers, concluding that *Keogh* barred treble damage claims by both. Because "the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors," the *Pinney Dock* court held that competitors "must seek whatever remedies are available under the provisions of the Interstate Commerce Act." 838 F.2d at 1457.

The Third Circuit's decision also conflicts with the Fourth Circuit's decision in *Lifschultz Fast Freight, Inc.* v. *Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir. July 6), *petition for cert. filed*, 62 U.S.L.W. 3289 (U.S. Oct. 4, 1993) (No. 93-549), issued less than a month after the panel decision here. That decision summarily affirmed a district court decision that followed the rationale of *Pinney Dock* and held that *Keogh* applies to actions by competitors as well as customers. *See Lifschultz*, 805 F. Supp. 1277, 1295-96 (D.S.C. 1992).

Nothing in *Keogh*, or any of this Court's subsequent decisions, supports the Third Circuit's decision to limit *Keogh* to claims brought by customers. To the contrary, the holding of this Court in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), was that *Keogh* barred treble damage claims by competitors of carriers as well as by customers.

The Third Circuit's distinction between competitors and customers likewise finds no support in the Interstate Commerce Act. Under the ICA, any "person"—including both customers and competitors—may file a complaint with the ICC asserting a violation of any provision of the Act, including those prohibiting rate discrimination, 49 U.S.C. § 10741, and authorizing the ICC to prescribe rates and practices, *id.* § 10704. *See id.* § 11701(b). Indeed, competitors have commonly availed themselves of this right.[1] The Act does not distinguish

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[1] *See, e.g., American Commercial Lines, Inc.* v. *Louisville & N. R.R.*, 392 U.S. 571 (1968) (water carrier); *ICC* v. *New York, N.H. & H. R.R.*, 372 U.S. 744 (1963) (same); *United States* v. *New York Cent. R.R.*, 272 U.S. 457, 461-63 (1926) (private dock). Competitors not only have standing before the ICC, but they can recover damages for competitive injuries, including lost profits, that result from violations of the ICA. *See Louisville & N. R.R.* v. *Ohio Valley Tie Co.*, 242 U.S. 288 (1916); *Terminal Warehouse Co.* v. *Pennsylvania R.R.*, 297 U.S. 500, 507 (1936).

between competitors and customers in this or any other relevant respect. *See Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 669 (1963).[2]

Finally, the Third Circuit's decision makes no sense as a matter of antitrust policy. "The antitrust laws were enacted for 'the protection of competition, not competitors' "[3]—that is, "to assure *customers* the benefits of price competition."[4] The Third Circuit's decision in this case, however, turns this central tenet of the antitrust laws on its head. Under the court of appeals' formulation, *Keogh* precludes only treble damage claims by customers, the intended beneficiaries of the antitrust laws. The law is content to leave their protection to the ICC, the Department of Justice, and private injunctive actions. But, according to the Third Circuit, competitors have an antitrust damage remedy against a filed rate that is denied to a railroad's shippers. This anomaly exists even though both the competitor and the customer could have sought relief

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[2] The petitioner in *Arrow* was a barge company that sought to enjoin a railroad from putting its filed rates into effect on the ground that the rates would drive the barge company out of business. Although the Court "admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers . . .," it found "no warrant in that omission, however, for a difference in result" and refused to permit a federal court injunction. *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 669 (1963). The Court's decision was based in part on the likely availability of remedies under the ICA for competitors and in part on the recognition that "[c]onflicts over rates between competing carriers were familiar to the Commission long before 1910; indeed, the struggle between competing barge and rail carriers has been going on almost since railroads came onto the national scene." *Id.* (footnote omitted).

[3] *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) (emphasis omitted).

[4] *Associated Gen. Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 538 (1983) (emphasis added).

by protesting the rate before the ICC. Such a perverse interpretation of the antitrust laws should not be allowed to stand.

The second aspect of the Third Circuit's *Keogh* holding is equally worthy of review by this Court. The court of appeals admitted that "ICC-approved rates played a role in thwarting market entry." Pet. App. 29a. Yet it held that respondents' claims were not "rate-related" under *Keogh* because the railroads "conspired to preclude competition" by "lower cost competitors." Pet. App. 29a, 32a.

This unprecedented holding is contrary to this Court's express reaffirmation of *Keogh* in *Square D*. The plaintiff in *Square D*, like the plaintiffs here, alleged "a conspiracy 'to fix, raise and maintain prices and *to inhibit or eliminate competition.*'" *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 412 (1986) (emphasis added) (citation omitted). The conspiracy alleged in *Square D* likewise denied customers the lower cost alternatives provided by competitors including other trucking companies that were coerced to participate in the conspiracy. *Id.* at 412-13.

Nevertheless, the Court held that *Keogh* barred the plaintiff's treble damage claims. The Court refused to limit *Keogh* narrowly to its facts, rejecting the argument that *Keogh* did not apply because of various allegations of "covert legal violations" of terms of the rate bureau agreement and coercing carriers from filing independent tariffs, *id.* at 417 n.19, allegations identical to those made by plaintiffs here. Thus, the court of appeals in this case was flatly incorrect in suggesting that *Square D* left unresolved what happens when "members of a regulated industry conspired to preclude competition in which ICC-approved rates played a role." Pet. App. 29a. The Court in *Square D* plainly held that the appropriate course was to excise all rate-related activities from the case and de-

termine whether non-rate activities themselves violated the Sherman Act. 476 U.S. at 414.

Again, the court of appeals' holding is in square conflict with the Sixth Circuit's decision in *Pinney Dock*, which involved the same defendants, the same alleged conspiracy, and essentially identical claims.[5] The Sixth Circuit in *Pinney Dock* held that "the *Keogh* doctrine bars the plaintiffs' antitrust damage claims insofar as those claims are based either on the defendants' own handling charges or on the line-haul rate that was applied from Pinney Dock." 838 F.2d at 1457. The Sixth Circuit further held that to the extent a "boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of *Keogh*." *Id.* at 1458. The Third Circuit here concluded otherwise, refusing to apply *Keogh* to claims involving the "refusal to handle self-unloaders at their docks [and] . . . boycotts of unregulated docks," Pet. App. 34a, even though the refusals and boycotts likewise "took the form of assessing higher rates and charges."

In practical effect, the court of appeals' decision creates an exception that would swallow the *Keogh* rule. The court's exception for conspiracies to "preclude competition" does no more than restate the substantive reach of Section 1 of the Sherman Act. Every claim under Section 1 must allege a conspiracy to preclude or eliminate competition—that is the "true test of legality" under the antitrust laws.[6] Moreover, every conspiracy found to be un-

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[5] The only difference cited by the court of appeals is that this case, after a full trial, is "in a different procedural position" than *Pinney Dock*, which was decided on summary judgment. Pet. App. 33a-34a. Given that on summary judgment disputed facts must be taken most favorably to the non-moving party, this distinction is meaningless.

[6] *E.g.*, *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes

lawful under the antitrust laws necessarily denies customers the availability of a lower-cost competitive option, otherwise there would be no harm to competition.

Taken at its word, the Third Circuit here does what this Court determined in *Square D* could only be done by Congress: do away with *Keogh* altogether.[7] Under the Third Circuit's formulation, *Keogh* no longer is "an essential element of the settled legal context," *Square D*, 476 U.S. at 423, or "an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes," *id.* Instead, the court of appeals treated *Keogh* as a remnant of regulation to be limited narrowly to its facts—a view this Court expressly rejected in *Square D*. *Id.* at 417 n.19. This Court should grant review in this case to make clear that end runs around Congress and this Court's decisions are impermissible. *Keogh* is part of the judicial and regulatory context in which railroads operate and only Congress should decide whether it will continue to govern the industry.

The Third Circuit's decision has widespread and continuing significance for the railroad industry. Common carriers filed nearly 1.4 million tariffs with the ICC during fiscal year 1992, close to triple the number filed in 1979. Interstate Commerce Commission, *1992 Annual*

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competition or whether it is such as may suppress or even destroy competition."

[7] That the Third Circuit's rejection of *Keogh* here is based on nothing less than a fundamental disagreement with this Court's reaffirmation of *Keogh* in *Square D* is revealed by a footnote in the court of appeals' opinion, which asserts that although the Staggers Act of 1980 "did not specifically overrule *Keogh*," it "significantly undermines its central rationale." Pet. App. 28a n.3. This assertion cannot be reconciled with *Square D*, in which this Court flatly rejected the identical argument that the Motor Carrier Act of 1980 (legislation similar to the Staggers Act but applicable to motor carriers) undermined *Keogh*. *Square D. Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419-20 (1986).

Report 79 & 113 App. B Table 2. *Compare* Interstate Commerce Commission, *1979 Annual Report* 116 App. B Table 7 (542,867). Of the total, 116,000 tariff filings were by rail carriers, a 16 percent increase over the previous year. *1992 ICC Annual Report* at 79. Again, the number of tariff filings by rail carriers in 1992 was almost double the number in 1979, immediately prior to enactment of the Staggers Act. *1979 ICC Annual Report* at 116 App. B Table 7 (59,291).

This Court has recognized the continuing importance of filed rates and tariff requirements by granting review in no fewer than three cases involving the filed rate doctrine (of which *Keogh* is an application) within the past five terms. *See Security Serv., Inc.* v. *K Mart Corp.*, 996 F.2d 1516 (3d Cir.), *cert. granted*, 62 U.S.L.W. 3287 (U.S. Oct. 18, 1993) (No. 93-284); *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). Indeed, in *Maislin*, this Court stressed again the importance of filed tariffs, invalidating an ICC policy that permitted motor carriers and shippers to negotiate rates in lieu of paying the tariff rate, and making clear that "[d]espite the harsh effects of the filed rate doctrine," it remains the law.[8] *Id.* at 128. After *Maislin*, then ICC Vice-Chairman Emmett emphasized that "filed rates were no longer harmless vestiges of a bygone era," as the Third Circuit treated them here.[9] *Investigation of Motor Carrier Collective*

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[8] The very first case this Court cited in *Maislin* in describing the filed rate doctrine was *Keogh*. *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).

[9] One district court has found the decision in *Maislin* a sufficient basis in itself to hold that *Keogh* extends to suits by competitors, not just customers. *See Wegoland, Ltd.* v. *NYNEX Corp.*, 806 F. Supp. 1112, 1116 n.1 (S.D.N.Y. 1992) ("In light of the Supreme Court's 1990 decision in [*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)], which expanded the [filed rate]

Ratemaking and Related Practices & Procedures, 7 I.C.C. 2d 388, 466 (1991).

* * * *

The Third Circuit's attack on *Keogh* is plainly worthy of review. It undercuts "an essential element" of the statutory scheme adopted by Congress more than seven decades ago and reaffirmed by this Court only seven years ago. *Square D*, 476 U.S. at 423. It threatens treble damage recovery not only under the antitrust laws, but also under RICO,[10] for railroads that charge the only rate they lawfully can charge. And by brushing aside the Sixth Circuit's contrary decision in *Pinney Dock*, it makes the treble damage liability of an interstate railroad under federal law depend on the circuit in which it is sued.

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doctrine to invalidate a forcefully and deliberately presented ICC policy, the Supreme Court's embrace of the filed rate doctrine can no longer be viewed as so tepid" as not to cover suits by competitors).

[10] A private right of action under RICO is available only to a person who has been "injured in his business or property," language identical to that contained in the treble damages provision of the antitrust laws that was construed in *Keogh*. 18 U.S.C. § 1964(c); *see Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317 (1992). Accordingly, the courts of appeals have held that the *Keogh* doctrine, and decisions construing that doctrine, apply under RICO as well. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992); *Taffet* v. *Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 24, 1993

APPENDIX

Association of American Railroads

Full Members

Alton & Southern Railway
Atchison, Topeka & Santa Fe Rwy. Co.
Bangor & Aroostook Railroad Company
Belt Railway Company of Chicago
Burlington Northern Railroad Co.
Cambria & Indiana RR Co.
Canadian National
Canadian Pacific
Chicago & North Western Trans. Co.
CSX Transportation
Consolidated Rail Corporation
Grand Trunk Western
Illinois Central Railroad
Kansas City Southern Railway
Manufacturers Railway Company
Monongahela Railway Co.
National Railways of Mexico
Norfolk Southern Railway Company
Peoria & Pekin Union Railway
Prescott & Northwestern RR Co.
Soo Line Railroad Company
Southern Pacific Transportation
Texas Mexican Railway Company
Union Pacific Railroad Company
Vermont Railway Inc.
Amtrak

Associate Members

Alaska Railroad
Apalachicola Northern Railroad Company
Atlanta, St. Andrews Bay Railway Company
Bessemer & Lake Erie Railroad Company
Chicago, Central, and Pacific Railroad Company

Chicago Rail Link
Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company
Duluth, Missabe & Iron Range Rwy. Co.
East Erie Commercial Railroad
East St. Louis Junction Railroad Company
Elgin, Joliet & Eastern Railway
French Rail Inc.
Gateway Western Railway Company
Genesee & Wyoming Railroad Company
Georgia North Eastern Railroad
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Hartsford & Slocumb Railroad Company
Hillsdale County Railway Company, Inc.
Kiamichi Railroad
Lake Superior & Ishpeming Railroad
Lanawee County Railroad Company, Inc.
Long Island Railroad
Louisiana & North West Railroad Company
METRO North Commuter Railroad
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
Montana Rail Link, Inc.
New Orleans Public Belt Railroad
Paducah & Louisville Railway, Incorporated
Pickens Railroad—National Railway Utilization Corp.
Port Terminal Railroad Association
Providence & Worcester Company
South African Transport
Texas & Northern Railway Company
Toledo, Peoria & Western Railroad Company
Upper Merion & Plymouth Railroad Company
Wheeling & Lake Erie Railway Company

Supreme Court, U.S.
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IN THE

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BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The National Motor Freight Traffic Association as *amicus curiae* will address the following question:

Whether the Court of Appeals for the Third Circuit correctly ruled that treble damages for antitrust violations may be recovered, despite this Court's decision in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), based upon two claimed exceptions to those authorities:

- where tariff rates are the primary, but not exclusive, means of inhibiting competition, or
- where competitors of the defendant, rather than shippers, are the plaintiffs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-643

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Motor Freight Traffic Association, Inc. (NMFTA) is a voluntary, not-for-profit incorporated trade association whose members are motor common carriers of freight. NMFTA is the agent for publication of the National Motor Freight Classification, which is the tariff within which approximately 7,000 participating motor common carriers operating in interstate, intrastate, or foreign commerce pursuant to

certificates of public convenience and necessity issued by the I.C.C. and/or state regulatory agencies, publish their classifications applicable to property that they transport. That classification tariff in turn is identified as a governing publication in rate tariffs of all of NMFTA's participating carriers.

This Court has specifically ruled upon the standing of this association to represent the interests of participating motor common carriers, *National Motor Freight Traffic Association, Inc. v. United States,* 372 U.S. 246 (1963), and NMFTA has appeared before this Court in several other cases.

NMFTA authorized the filing of this Brief to advise the Court of the motor carrier industry's intense interest in the proper application of *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The continuing vitality and importance of that decision was expressly affirmed by the Court only seven years ago in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), a case in which some of NMFTA's members were named defendants.

The proper application of *Keogh* is important to NMFTA's members because their tariffs as filed with the Interstate Commerce Commission define both the extent of their service as common carriers and the compensation for those services. As the Court has observed, the Motor Carrier Act of 1980, *94 Stat. 793,* reformed the regulation of motor common carriers operating in interstate commerce. However it did not modify the duty of carriers, pursuant to *49 U.S.C. 10762,* to file their tariffs and to conform strictly to their provisions. See *Maislin Industries, U.S. v. Primary Steel,* 497 U.S. 116 (1990).

A huge volume of traffic moves each and every day subject to the tariff rates published by these carriers. NMFTA's principal members alone haul more than one hundred million shipments subject to tariff rates each and every year. Statistics published by the Interstate Commerce Commission reflect that in 1991 the larger motor carriers of property received more than $38 billion in common carrier revenue, as compared to more than $5 billion in contract carrier revenue.[1] In FY 1992, the ICC received 1,159,106 tariff filings by motor common carriers of property.

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of Petitioner Bessemer & Lake Erie Railroad Company accurately sets forth a detailed account of the proceedings below, which will not be repeated here. The interest of NMFTA's members focuses upon the ruling by the Court of Appeals pertaining to the *Keogh* doctrine. While the Third Circuit acknowledged that ICC approved rates played a central role in the case, the Court ruled that *Keogh* does not apply to bar the plaintiffs' antitrust claims for two reasons. First, it ruled that *Keogh* does not apply to antitrust claims filed by competitors of the defendant. Consequently, it upheld the verdict for damages in favor of competing trucking companies and dock owners. Pet App. 36a. Second, it ruled that *Keogh* does not bar claims of shippers where the conspiracy alleged is one to "preclude competition" by "lower cost competitors," by means that include some conduct unrelated to rates. Pet. App. 29a, 32a.

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[1] 1992 Annual Report of the Interstate Commerce Commission, Table 5, p. 131.

REASONS FOR GRANTING THE WRIT

Both aspects of the Third Circuit's ruling call for review by this Court since they conflict with the decisions of other circuits as well as recent pronouncements by this Court. The exception crafted by the Third Circuit for suits by competitors is contrary to the ruling of the Sixth Circuit in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.)., *cert. denied*, 488 U.S. 880 (1980).

NMFTA's participating carriers operate in all 50 states and between the United States and Canada under tariffs on file with the ICC. The conflict between the Third Circuit and other circuits upsets the stability of settled antitrust doctrine and threatens its members with different rules, depending upon the circuit in which a plaintiff happens to commence a lawsuit. The importance of the freight that is moving subject to their tariff rates makes it imperative to resolve the conflict. Therefore, a writ of certiorari should be issued to review the decision, so as to ensure the uniform application of the antitrust laws to regulated industries.

THE COURT SHOULD GRANT REVIEW TO DETERMINE THE SCOPE OF THE *KEOGH* BAR TO PRIVATE ANTITRUST DAMAGE CLAIMS BASED UPON ALLEGEDLY NONCOMPETITIVE FILED RATES IN REGULATED INDUSTRIES.

The Third Circuit's conclusion that *Keogh* does not bar antitrust damage claims by competitors is contrary to this court's decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), to the decisions of other circuits, and to the rationale underpinning the filed rate doctrine. In *Keogh* the Court held that

the legal rights of parties with respect to rates subject to regulation by the ICC are defined by the tariffs filed with that agency. "Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate." [emphasis added] 260 U.S. at 162-63. Consequently, no private treble damage action could be based upon a theory that, but for some allegedly anticompetitive conduct, a different rate would have applied.

The Third Circuit postulated that this doctrine does not apply to claims by competitors. But this Court ruled otherwise in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945). There the State of Georgia claimed damages against northern railroads, and it sought such damages in two capacities: as owner of a railroad and as *parens patriae* of its citizens, including various port and dock interests. The Third Circuit considered *Georgia* inapplicable because the state's claim as owner of a railroad was referred to as a "makeweight." App. 37a n. 6. Nevertheless, this Court's decision in *Georgia* was not so circumscribed. This Court ruled that it was clear from *Keogh* alone that Georgia could not recover damages, either as owner of a railroad or as *parens patriae* of its nonshipper port and dock entities. It held that the reasoning and precedent of *Keogh* applied with "full force" to the claims asserted by the State of Georgia.

The opinion below acknowledged the split in the lower courts concerning the application of the *Keogh* doctrine to suits by competitors. In support of its decision that *Keogh* does not apply to such suits, the court cited *Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1985) *cert. denied* 459 U.S. 1170 (1983); *Groton v. Connecticut Light & Power Co.*, 662 F.2d

921 (2d Cir. 1981), and *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985).[2] On the other hand, the Third Circuit acknowledged that its holding conflicts directly with that of the Sixth Circuit in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1980).[3]

The decision by the Third Circuit to permit antitrust damage suits by competitors, although suits by shippers are barred, is contrary to the plain terms of the Interstate Commerce Act, which makes the filed rate the only legal rate for all purposes. Competitors, as well as shippers or any other "interested party," may file complaints with the ICC against existing rates or petitions for suspension of new or changed rates. See *49 U.S.C. 10705, 10708, 11701.* Any "person" may file such a complaint which triggers a rate investigation. *Merchants Warehouse Co. v. United States*, 283 U.S. 501 (1931).

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[2] The latter case, *Barnes*, is questionable authority for claims filed with respect to tariff rates. Summary judgment was denied only because there were non-tariff claims which could independently support the suit, but summary judgment in favor of the only carrier defendant was affirmed.

[3] The Third Circuit's decision also is contrary to the recent decision of the Fourth Circuit summarily affirming the well reasoned analysis of the district court in *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir., July 6, 1993), *cert. pending*, No. 93-549, affirming 805 F. Supp. 1277, 1282 (D.S.C. 1992). There the district court agreed with the Sixth Circuit that three of the four reasons for the *Keogh* doctrine support its application to suits by competitors. However, the doctrine was merely a subsidiary reason for dismissal in that case, and the same result would have been reached regardless of *Keogh*.

This Court's decision in *Maislin Industries, U.S. v. Primary Steel,* 497 U.S. 116 (1990) reemphasized the status of the filed rate as the sole measure of legal rights under the Interstate Commerce Act. Citing *Keogh*, this Court reaffirmed the primacy of the filed rate as the legal rate for all purposes, *Id. at 128.* No act of the carrier could estop it from collecting or enforcing the filed tariff rate.

After *Maislin,* there can be no doubt about the continued vitality of the filed rate doctrine.[4] That doctrine is the linchpin of *Keogh*, and it can be given effect only when the filed rate governs the legal rights of all persons. The notion that the filed rate is the only legal rate with respect to some persons but not the only legal rate with respect to others simply makes no sense.

The Court also should review the other reason cited by the Third Circuit for ignoring *Keogh*, namely that the defendant's behavior involved both rate activity and actions that were not rate related. It held that *Keogh* does not apply because the purpose of the conspiracy was to preclude competition by thwarting market entry and the means employed were not exclusively rate related. This holding is squarely con-

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[4] One district court recently found *Maislin* a sufficient basis in itself to hold that *Keogh* extends to suits by competitors, not just customers. See *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1116, n. 1 (S.D. N.Y. 1992) ("In light of the Supreme Court's 1990 decision in [Maislin], which expanded the [filed rate] doctrine to invalidate a forcefully and deliberately presented ICC policy, the Supreme Court's embrace of the filed rate doctrine can no longer be viewed as so tepid" as not to cover suits by competitors.).

trary to this Court's opinion in *Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409 (1986).

The argument that application of the *Keogh* doctrine may be avoided by demonstrating an anticompetitive purpose would create an exception that swallows the rule. Every conspiracy that may run afoul of the antitrust laws has an anticompetitive purpose. Every claim under Section 1 of the Sherman Act must feature a conspiracy to preclude or eliminate competition. *Board of Trade v. United States,* 246 U.S. 231, 238 (1918). The complaint in *Square D* alleged that the alleged conspiracy had a twofold purpose: (1) "to fix, raise and maintain prices," and (2) "to inhibit or eliminate competition for the transportation of freight by motor carrier." *Square D,* 476 U.S. at 412. Nevertheless, this Court ruled that the 1980 changes in regulation of the motor carrier industry had not affected the viability of the *Keogh* doctrine. Consequently the plaintiffs' claims for antitrust damages were barred.

Square D also involved claims that the defendants had engaged in anticompetitive actions that did not involve rates. That aspect of the case was discussed at greater length in Judge Friendly's decision in the Second Circuit, *Square D Co. v. Niagara Frontier Tariff Bureau,* 760 F.2d 1347 (2d Cir. 1985). After concluding that *Keogh* barred the plaintiffs' claims for damages arising out of rate-related conduct, the court turned to allegations raised at oral argument that the carrier's conduct included agreements "not to solicit or try to attract certain types of traffic," and that the carriers had engaged in boycotts and other actions interfering with others. *Id.* at page 1365. The Second Circuit's decision remanded the case to consider the

plaintiffs' right to an injunction and also to afford the plaintiffs an opportunity to amend their complaint to state a proper case for damages *limited to* non-rate related conduct. This Court's decision in *Square D* approved that disposition of the case by the Second Circuit. *Id* at page 414.

In the instant case, the plaintiff's were not required to limit their claim for damages to actions that did not involve filed rates. Instead, the court permitted a modicum of alleged non-rate related activity to become the fulcrum for the jury's verdict imposing huge treble damages allegedly caused by filed rates. Thus the non-rate related activity was permitted to become the proverbial tail wagging the dog.

This exception threatens to gut the *Keogh* doctrine. If the decision below is allowed to stand, it may be expected that future plaintiffs will routinely allege some incidental non-rate related conduct as a vehicle for avoiding *Keogh* in cases where filed rates are claimed to have resulted in antitrust damages.[5]

The Third Circuit's decision crafting an exception for claims that include some non-rate related conduct with an anticompetitive motive is inconsistent with the Sixth Circuit's decision in *Pinney Dock*, which involved the same defendants and the same alleged conspiracy. The Sixth Circuit expressly ruled that to

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[5] This mischief is not limited to antitrust claims. Recognizing that the rationale behind the *Keogh* doctrine applies with equal force to statutory claims under RICO, the courts of appeals have applied *Keogh* in that context also. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 494 (8th Cir. 1992) *cert. denied*, 112 S.Ct. 2306 (1992); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 657 (1992).

the extent a boycott or refusal to deal was manifested by the assessment of higher rates or charges, the claim ran afoul of *Keogh*. 838 F.2d at 1457.

The Third Circuit's decision threatens the collective ratemaking activities of motor carrier rate bureaus, which are authorized pursuant to *49 U.S.C. 10706*. All of NMFTA's members participate in the activities of the National Classification Committee, which is authorized by the ICC to collectively determine and publish a tariff which classifies by their transportation characteristics the thousands of commodities moving in commerce. In addition, most of its members also belong to one or more ICC authorized rate bureaus, which make it possible for them to create a nationwide network of interline motor carrier service at joint through rates. One of those bureaus, Niagara Frontier, was among the defendants in *Square D*, where this Court held that the *Keogh* doctrine precludes private plaintiffs from circumventing the statutory immunity by pleading "covert legal violations" of the rate bureau agreements. 476 U.S. at 417, n. 19. If the decision in the instant case is allowed to stand, private damage claimants hereafter will plead some incidental non-rate related conduct as the talisman for avoiding *Keogh* and recovering treble damages.

CONCLUSION

The foregoing considerations plainly warrant review of the Third Circuit's decision. As this Court noted in *Square D*, the *Keogh* doctrine "has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades." The Third Circuit's decision would topple that guidepost by creating exceptions that render *Keogh* a mere hollow shell. The importance of tariff filing throughout all of the the regulated industries, including the motor common carrier industry, plainly warrants review for the purpose of restoring uniformity among the circuits in application of that fundamental guidepost. The petition for writ of certiorari should be granted.

Respectfully submitted,

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BESSEMER & LAKE ERIE RAILROAD COMPANY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The Business Roundtable respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for petitioners has been obtained. Although the attorneys for respondents were contacted in advance of filing deadlines for the attached brief, some of the attorneys for some of the respondents (such as Republic Steel Corporation, Jones & Laughlin Steel Incorporated and Wheeling-Pittsburgh Steel Corporation) at this point have not consented to the filing of the attached brief.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These companies, widely dispersed by type of business and geographic location, are substantial producers and consumers of goods and services. They believe it is critical that the marketplace operate competitively.

Accordingly, they have a vital interest in antitrust law interpretation and enforcement, including the continued viability of the rules announced in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which bar claims by either plaintiffs or defendants that antitrust damages have been passed on. Members of The Business Roundtable have been both antitrust defendants and antitrust direct purchaser plaintiffs, and share the concerns that this Court expressed in *Hanover Shoe* and *Illinois Brick* about manageability and fairness in antitrust litigation.

In this case the court below decided that *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), had modified the prohibition against litigation of pass on issues. The attached brief demonstrates that *Associated General Contractors* did not modify the *Illinois Brick* (and *Hanover Shoe*) rule, and also that the lower court's own modification of the rule violates important and compelling policy considerations. Accordingly, if permitted to stand, the Third Circuit's decision could unleash all the evils which the *Illinois Brick* court attempted to contain—the risk of multiple liabilities for defendants, unduly complex and unmanageable antitrust litigation, and reduced incentive for antitrust enforcement by private parties.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

Respectfully submitted,

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---

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These companies, widely dispersed by type of business and geographic location, are both substantial producers and consumers of goods and services. They have a direct interest in the standards, established by this Court in the *Illinois Brick* [1] case, that promote an efficient, manageable and fair resolution of antitrust disputes. They are concerned about the process, not only as potential de-

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[1] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

fendants, but also as potential plaintiffs with substantial claims as direct purchasers.[2]

Because the parties are represented by eminent counsel, and because it is likely that other briefs *amici* will be filed, The Business Roundtable will not burden this Court with a repetitious recitation of the relevant facts or with arguments that merely restate those made elsewhere. Instead, The Business Roundtable will simply focus on the reasons why this Court should overturn the Third Circuit's unilateral modification of *Illinois Brick*. This brief will show, first, that the Third Circuit was wrong to assume that *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), substituted a balancing test for the clear-cut, bright-line rule enunciated in *Illinois Brick*. The *Illinois Brick* decision, which bars litigation based on the claim that antitrust damages have been passed on, was in turn based on the compelling policy concerns outlined in *Hanover Shoe*[3] twenty-five years ago. This Court has never retreated from either decision. Second, this brief will show that the public policy considerations that drove the *Illinois Brick* and *Hanover Shoe* decisions are as valid and compelling today as they were when those cases were decided, and that the Third Circuit's decision undercuts these policy considerations.

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[2] Petitioner has consented to the filing of this brief and its original letter of consent is filed herewith.

[3] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

ARGUMENT

I. *ASSOCIATED GENERAL CONTRACTORS* DOES NOT MODIFY *ILLINOIS BRICK*.

Illinois Brick and *Hanover Shoe*, taken together, establish the strong and complementary principles that direct purchasers have the right to recover for antitrust overcharges, and that neither defendants nor so-called "indirect" purchasers will be heard to assert that these overcharges were passed on. Thus, pass on arguments cannot be employed either as a sword by antitrust plaintiffs or as a shield by antitrust defendants. This policy judgment is based on the need to avoid possibly insurmountable "evidentiary complexities and uncertainties," to eliminate the risk that defendants would suffer multiple liability, and to ensure effective enforcement of antitrust laws. *Illinois Brick*, 431 U.S. at 730-33, 745-46. Not surprisingly, the exceptions to this direct purchaser rule are limited and narrow. *See Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 216-17 (1990).[4] In this case this Court refused to carve out exceptions to *Illinois Brick* for particular markets, explaining that "[h]aving stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation. . . ." *Utilicorp United*, 497 U.S. at 217.

Despite the Supreme Court's express pronouncements on the scope and contours of the *Illinois Brick* rule, the court below adopted a balancing test that would permit plaintiffs in this case to recover antitrust damages based

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[4] The Supreme Court has identified two possible exceptions to the direct purchaser rule. The first occurs where an overcharged buyer was a party to a "cost-plus" contract, which effectively ensured that the direct purchaser could pass on the entire overcharge without fear of a decrease in its own sales. *See Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 736. The second exception occurs "where the direct purchaser is owned or controlled by" the indirect purchaser. *Illinois Brick*, 431 U.S. at 736 n.16. Neither exception is at issue in the present case.

upon a pass on argument.[5] To support its conclusion, the court invoked *Associated General Contractors*, a Supreme Court opinion decided subsequent to *Illinois Brick* but *before* the Court's reaffirmation of *Illinois Brick* in *Utilicorp United*.

Moreover, *Associated General Contractors* is not an indirect purchaser case. There is not one word in that decision that even purports to overrule, modify, or question *Illinois Brick's* prohibition against indirect purchaser antitrust suits.[6]

Illinois Brick and *Associated General Contractors* should be read together as complementary cases. What *Illinois Brick* says is that pass on claims should never be entertained, except in extraordinary situations—for the reasons spelled out in that decision and in *Hanover Shoe*. But there are other remote claimants whose cases do not depend on an overcharge pass on argument, and *Associated General Contractors* establishes groundrules for a standing inquiry in those situations.

In *Associated General Contractors*, the antitrust plaintiffs represented local unions and trade councils. They charged that a multi-employer association and its members coerced third parties to enter into business relations with nonunion firms. Thus, the plaintiffs did not stand in the direct line of distribution allegedly tainted by the unlawful restraints, and did not rely on pass on of over-

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[5] Appendix to Petition for Writ of Certiorari (hereinafter "App.") at 49a-51a.

[6] *Associated General Contractors* does cite to *Illinois Brick* and, in fact, concludes that the policy concerns behind the *Illinois Brick* rule are relevant factors to consider in determining whether any antitrust claimant has antitrust standing. *Associated General Contractors*, 459 U.S. at 544-45. However, contrary to the Third Circuit's apparent assumption, the extension of *Illinois Brick's* policy rationales to another context is not tantamount to a rejection or reformulation of the *Illinois Brick* rule.

charges.[7] *Associated General Contractors* does not modify *Illinois Brick*, it supplements it by identifying antitrust standing considerations in situations where *Illinois Brick* does not apply.

Other courts of appeal have had no trouble understanding that the *Illinois Brick* test continues to apply in situations where the putative plaintiff relies on the claim that an original overcharge has been passed on. *See, e.g., Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 839 F.2d 1206, 1210 (7th Cir.), *cert. denied*, 488 U.S. 986 (1988) ("We read *Illinois Brick* as requiring that in this case, as well as more complex cases, it is only the direct purchasers who may bring a treble damage action."); *Adams* v. *Pan American World Airways, Inc.*, 828 F.2d 24, 28 n.9 (D.C. Cir. 1987) ("Unlike *Illinois Brick*, which flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases, *Associated General* does not go so far as to say that suppliers of an input never have standing to assert a claim for damages resulting from illegal restraints in their purchaser's market."); *Fisher* v. *Wattles*, 639 F. Supp. 7, 8 (M.D. Pa. 1985) (Under *Illinois Brick* and its progeny, "remote purchasers have no cause of action under" the federal antitrust laws "except in two narrowly-defined, exceptional situations.").

In *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), the court explained that *Illinois Brick* and *Associated General Contractors* offer two separate and independent tests for evaluating antitrust stand-

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[7] The unions' claims rested on the following complex reasoning—as a result of defendants' alleged coercion, certain firms diverted business away from union subcontractors, which in turn had to cut their work forces or reduce hours or compensation for their employees, which in turn forced the out-of-work or lower compensated employees to reduce the amount of dues they paid to the plaintiff unions and trade councils. *Associated General Contractors*, 459 U.S. at 545. Essentially, the union plaintiffs' claims were as attenuated as antitrust claims by mortgagors or creditors of the lower-paid or out-of-work employees would have been.

ing—and affirmed dismissal of an indirect purchaser's suit on *Illinois Brick* grounds, without even determining whether *Associated General Contractors* would lead to the same result. The court below cited *Merican, Inc.* and acknowledged that the case was decided solely "on the operation of the *Illinois Brick* concern." App. at 47a-48a. However, the court concluded that the case before it could not similarly be decided because the facts at issue "require, under [*Associated General Contractors*] a more complete analysis." App. at 48a. The Court did not explain why it was "require[d]" to disregard the landmark case on pass on claims (*Illinois Brick*) and follow a case that did not deal with overcharge pass on claims at all.

The difference between the bright line test of *Illinois Brick* and the balancing test of *Associated General Contractors* is of enormous practical significance. The antitrust litigation process can consume vast public and private resources, regardless of the outcome. Litigation costs can deter potential plaintiffs from the pursuit of meritorious claims and can deter defendants from the pursuit of meritorious defenses. If a complex balancing test is substituted for the *Illinois Brick* rule, what would otherwise be simple direct purchaser actions are likely to be turned into nationwide extravaganzas, in which standing issues cannot be resolved until there has been an extensive and expensive inquiry into the facts. In antitrust litigation, there is merit in *per se* rules of procedure as well as *per se* rules of liability.

II. THE PUBLIC POLICY JUSTIFICATIONS BEHIND THE *ILLINOIS BRICK* DECISION ARE STILL VALID TODAY.

A. The Risk of Duplicative Recoveries

Illinois Brick rests upon important policy grounds that are as valid and compelling today as they were in 1977 when *Illinois Brick* was decided. The Supreme Court

found, for example, that defendants would be exposed to the risk of multiple liabilities if pass on claims were entertained. *Illinois Brick*, 431 U.S. at 730. This risk followed from the absolute barrier against the *defensive* use of pass on arguments erected by the earlier opinion in *Hanover Shoe*. If there were no complementary barrier to the *offensive* use of a pass on argument, there would be:

> the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever.

Id. at 730-31. Accordingly, to avoid the risk of duplicative recoveries by plaintiffs and multiple ilabilities for defendants in the federal courts,[8] it is essential to preserve the symmetry between *Illinois Brick* and *Hanover Shoe*.

If *Associated General Contractors* is misinterpreted to permit a pass on offense under certain circumstances, *Hanover Shoe*'s ban on pass on defenses would have to be similarly modified to preserve fairness and symmetry. It is incredible to suppose that *Associated General Contractors* contemplated such a result—especially since this

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[8] It is true that duplicative recoveries are possible in actions under state antitrust laws. This result was sanctioned by this Court's decision in *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), which sustained so-called state "indirect purchaser" statutes against claims of federal pre-emption. But nothing in *ARC America* purports to modify federal policy articulated in *Illinois Brick*. If there is some risk of duplicative recoveries in state law actions, it is even more important for federal courts to avoid standing rules that will *increase* the risk.

Court was not confronted with an overcharge pass on claim or defense in that case. Indeed, in at least one subsequent case, the Supreme Court unequivocally stated that "no indirect purchaser is entitled to sue for damages for a Sharman Act violation . . . ." *ARC America*, 490 U.S. at 100. This express Supreme Court reaffirmation of the *Illinois Brick* rule is at odds with the Third Circuit's claim that the Supreme Court itself somehow modified *Illinois Brick* in *Associated General Contractors*. In addition, as mentioned above, the decision in *Utilicorp United* refutes the Third Circuit's position.

B. The Importance of Manageability

The *Illinois Brick* rule was also mandated by the need to avoid "evidentiary complexities and uncertainties" that necessarily are involved in pass on claims. *Illinois Brick*, 431 U.S. at 732. This policy consideration is just as compelling today as it was in 1977, when *Illinois Brick* was decided. These complexities and uncertainties are of two kinds: one arising out of the multiplicity of claimants and the other arising out of the difficulties in calculation of damages.

Large and complex economies are characterized by lengthy and complicated channels of distribution; it is a mistake to suppose that a modification of *Illinois Brick* would require pass on calculations at only one level. The facts of *Illinois Brick* itself illustrate the point. The case involved a conspiracy by manufacturers to fix the price of masonry brick. Theoretically, direct purchaser brick wholesalers, masonry contractors, general contractors, initial purchasers of brick buildings, subsequent purchasers of the buildings, lessees of the buildings, and even purchasers of goods or services from lessees of the buildings could claim economic injury resulting from a pass on of the initial overcharge. A line has to be drawn somewhere—and, wherever the line is drawn, someone in an-

other layer may be able to construct a plausible claim of damage.[9]

The second complexity arises from the fact that a calculation of damages passed on would be extraordinarily difficult. The estimation of damages suffered by direct purchasers alone is no easy task. There are very few cases where evidence has indicated that price-fixing conspirators met and agreed on a specific price increase that otherwise would not have occurred. In most cases, there will be evidence of words or actions designed to maintain or increase prices generally, and it is necessary to estimate what the "but for" world would have looked like. This typically is done by plotting sales prices in an industry over a period of time, which ideally extends before and after the "conspiracy period." The construction of this "actual" price line itself can be complicated because of elaborate discount structures and adjustments for product specifications. Then, for comparison purposes, a "competitive" price line is extrapolated forward or backward from an untainted period. This is no easy task either because account has to be taken of inflation rates and changes in overall supply and demand conditions at the seller level. Economists have widely differing opinions on these issues.

This is all required to determine damages at the first level. In order to estimate damages that are passed on, it would then be necessary to analyze the "elasticities" of supply and demand at subsequent levels in the distribution chain—"elasticities" being a technical term to describe the extent to which the supply of a product or demand for a product varies with its selling price.[10] This

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[9] This situation can arise in other areas of law. In a personal injury case, for example, injured people can recover in full for the harm—even though a portion of the harm may have actually been suffered by others, like employers or relatives.

[10] For discussion of the economics of pass on, see Cirace, *Apportioning Damages Between Direct and Indirect Purchasers in Con-*

would require a massive inquiry into industry economics at the first purchaser level. (The supply and demand conditions at the purchaser level are, of course, quite different from those that presumably have already been investigated for the supplier level.) These facts would also vary over time with changes in supply and demand conditions.

The task would thus be vastly more complex than the already complex task of estimating direct purchaser damages. The estimated overcharges at the direct purchaser level, derived from actual and reconstructed price lines, would have to be modified by continuously changing adjustments over time—and each one of these adjustments would be the subject of intense economic controversy. This process would have to be repeated again and again for every level in the chain.

In *Illinois Brick*, the Court noted that "it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Illinois Brick*, 431 U.S. at 742. Nothing has occurred in the field of economics to undercut the validity of this statement or to suggest that the complexity concerns expressed in *Illinois Brick* have in any way abated. Accordingly, the Third Circuit's abandonment of the bright-line *Illinois Brick* rule undermines this Court's concern about the unacceptable levels of complexity that are introduced by pass on claims.

C. Potential Adverse Effects on Enforcement

Finally, the *Hanover Shoe* and *Illinois Brick* opinions expressed concern that the complexities of pass on claims would undermine antitrust enforcement. The Court con-

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solidated Antitrust Suits: ARC America Unravels the Illinois Brick Rule, 35 Vill. L. Rev. 283, 311-17 (1990). This article is here referenced because the analysis of the problem is instructive, but The Business Roundtable does not agree with the author's recommended solutions.

cluded in *Illinois Brick* that indirect purchaser suits would discourage "vigorous private enforcement of the antitrust laws" by reducing the incentive for private parties to bring suit. *Illinois Brick*, 431 U.S. at 745. Litigation of pass on issues would increase the complexity and costs of antitrust suits, "reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group," and interject uncertainty as to how much of an overcharge could be established and how much would be apportioned among the various plaintiffs. *Id.* The Third Circuit's re-formulation of *Illinois Brick*, which permits indirect purchaser suits if a court finds "the facts [so] require" (App. at 48a), may enable a particular plaintiff to recover in a particular case, but in the long run it would frustrate and undermine this Court's goal of promoting antitrust enforcement.

CONCLUSION

This Court barred pass on claims in both *Hanover Shoe* and *Illinois Brick* in order to minimize the risk of duplicative recoveries, to avoid unmanageable litigation, and to promote antitrust enforcement actions. These considerations are as compelling today as they were when those cases were decided. The Third Circuit has misapplied *Associated General Contractors* in a way that would undercut both of these decisions and their compelling policy concerns.

We urge this Court to review the decision below, and reverse.

Respectfully submitted,

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Petitioner,

v.

REPUBLIC STEEL CORPORATION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT WHEELING-PITTSBURGH CORPORATION PURSUANT TO RULE 15.7

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SUPPLEMENTAL BRIEF FOR RESPONDENT WHEELING-PITTSBURGH CORPORATION PURSUANT TO RULE 15.7

Respondent Wheeling-Pittsburgh Corporation submits this supplemental brief pursuant to Supreme Court Rule 15.7 to set forth events that occurred subsequent to the filing of the briefs in opposition to the petition for a writ of certiorari.

Two days ago, it was announced that the claims of respondents Republic Steel Corporation (Republic) and Jones & Laughlin Steel Incorporated (J&L) have been settled for $375 million. On November 30, 1993, LTV Corporation (on behalf of respondents Republic and J&L) and USX Corporation (former parent of petitioner Bessemer & Lake Erie Railroad Company) issued simultaneous press releases reporting that they had reached an agreement in principle to settle the

claims of those two respondents. The press releases state that the settlement has been approved by the boards of directors of both LTV and USX and that the specific terms of the settlement will be set forth in a written agreement currently being finalized. The claims of respondents Republic and J&L account for more than 70% of the aggregate outstanding judgments in this litigation.

Respectfully submitted.

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION

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QUESTION PRESENTED

1. Whether a settlement by the Petitioner of a majority of the Respondents' claims has any impact on the questions presented by the petition for a writ of certiorari?

RULE 29.1 STATEMENT

Respondent National Steel Corporation is owned by NII Capital Corporation (a wholly-owned subsidiary of National Intergroup, Inc.) and NKK U.S.A. Corporation (a wholly-owned subsidiary of NKK Corporation). The non-wholly owned subsidiaries of National Steel Corporation are: Concast Holding A.G.; Iron Ore Company of Canada; Iron Ore Land Company; Mathies Coal Company; The Mesaba-Cliffs Mining Company; Pilot Knob Pellet Company; Presque Isle Corporation; Procoil Corporation.

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SUPPLEMENTAL BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION

On December 13, 1993, this Court directed the parties to file supplemental briefs addressing the impact of the settlements between the petitioner, B&LE, and certain respondents on the questions presented by B&LE's petition for writ of certiorari. Respondent National Steel Corporation ("National") files the following response.

ARGUMENT

In its petition, B&LE argued that this was an "extraordinary antitrust case" deserving of review by this Court in part because the Third Circuit had af-

firmed judgments that were "... more than double the largest judgment previously affirmed in a federal antitrust case." Petition at 1. After filing its petition, B&LE agreed to settle with the two largest judgment-holders by paying a total of $375 million to Republic Steel Corporation ("Republic") and Jones & Laughlin Steel Corporation ("J&L"). B&LE has now also settled the claims of Erie-Western Pennsylvania Port Authority and Codan Corporation (collectively "Erie") and C.D. Ambrosia Trucking Company for an undisclosed amount.

To the extent that B&LE asserted that the size of the judgments affirmed below justified review by this Court, that justification no longer exists. B&LE has now settled approximately 75% of the judgments pending against it.

For the reasons stated in the briefs in opposition to the petition, B&LE's petition should not be granted. As to National, review of its judgment is even less warranted in light of the settlements. B&LE's two questions presented for review concerned the application of this Court's decisions in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). National owned and operated its own fleet of vessels for the transportation of iron ore. Both lower courts held that neither *Keogh* nor *Illinois Brick* had any application to National's claims. B&LE never challenged the lower courts' treatment of National based on its unique factual circumstances and there is no sound basis for this Court to review National's judgment. The settlement of the claims of the parties targeted by B&LE in its petition warrants denial of the petition.

A. Impact of Settlements On B&LE's Question As To Application of *Keogh*.

B&LE's first question presented for review was whether *Keogh* should have barred the claims of the steel companies as "customers" of the railroads whose claims "primarily" involved the rates charged by the railroads. B&LE Petition at (i). Review is not warranted because the Third Circuit expressly held that the "customer" claims were *not* of the type barred by *Keogh* but rather were based on a conspiracy which only "coincidentally implicate[d] rates." Third Circuit Opinion, Pet. App. at 32a. Erie was the only respondent whose claims arguably implicated rates. The settlement of Erie's claims makes review by this Court unnecessary.

In any event, the Third Circuit expressly held that *Keogh* did not apply to National's claims because of National's unique factual position. Third Circuit Opinion, Pet. App. 29a, n.4. Neither B&LE's petition nor its reply contested the Third Circuit's holding on that point. Accordingly, B&LE has waived the right to raise it in this Court.

There is also no sound basis for B&LE's request to extend *Keogh* to claims by competitors. The Court recently refused to review the exact issue now presented by B&LE. *See Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware*, No. 93-549, *cert. denied*, November 29, 1993 (the question presented and denied was "whether the 'filed rate' doctrine enunciated in *Keogh v. Chicago N.R. Co.*, 260 U.S. 156 (1922) bars an antitrust action by one competitor against another?")

B. Impact of Settlements On B&LE's Question As To Application of *Illinois Brick*.

In its second question presented for review, B&LE asks the Court to apply *Illinois Brick* to the claims of the "steel companies" as "indirect purchasers". For the reasons stated in the steel companies' joint brief in opposition, B&LE cannot distort a conspiracy case directed at the steel companies into an *Illinois Brick* posture. Even under the B&LE's incorrect and overly broad interpretation of *Illinois Brick*, however, there is no impact on National's claims. Despite B&LE's indiscriminate use of the term "steel companies," the district court, the Third Circuit and even B&LE below have recognized National's unique factual situation and have acknowledged that *Illinois Brick* simply cannot apply to National's claims because National owned its own fleet of vessels for the transportation of iron ore and suffered direct, unique injury. Third Circuit Opinion, Pet. App. 42a, n. 11; District Court Pretrial Order No. 11, Joint Response App. at 33A-35A; B&LE Appeal Brief at pp. 42-51.

In its ruling on the railroads' motion to dismiss below, the district court held that *Illinois Brick* did not apply because "National's claim for damages in the lake transport market depends on evidence that defendants' actions delayed introduction of the cheaper self-unloader technology by National; it does not implicate any hired lake transportation." Joint Response App. at 33A-35A. The Third Circuit held that B&LE's *Illinois Brick* contentions did not apply at all to National Steel's claims:

> National Steel Corporation, which owned and operated self-unloader vessels, offered substantial evidence that their intent and read-

> iness to enter into the lake transportation business was frustrated by the conspiracy. National Steel actually purchased its own self-unloading vessel, the *Stinson*, in 1974. Because National Steel transported its own iron ore, rather than contracting with outside vessel companies, it did not offer evidence concerning lake transport damages. Also, because it was a vessel owner, notions of indirect injury concerning dock handling charges do not apply to National Steel. Further, National's claim is not jeopardized by the threat of overlapping damages as no other plaintiff suffered this distinct type of injury.

Third Circuit Opinion, Pet. App. p. 42a, n. 11.

CONCLUSION

The petition for certiorari should be denied.

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SUPPLEMENTAL RESPONSE OF PETITIONER

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SUPPLEMENTAL RESPONSE OF PETITIONER

This brief is submitted pursuant to this Court's order of December 13, 1993, directing the parties to address the impact of the settlement of the claims of several respondents on the questions presented by the petition for a writ of certiorari.[1] Since the entry of that Order, petitioner has notified the Court that it reached settlement agreements with three additional respondents,[2] and this

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[1] On December 9, 1993, USX Corp. (the former parent of petitioner B&LE) entered into an agreement with LTV Corp. (on behalf of respondents Republic Steel Corp. and Jones & Laughlin Steel Corp.) settling all of their claims in this case. On that date, a stipulation was filed with this Court.

[2] On December 10, 1993, USX reached a separate agreement with respondents C.D. Ambrosia Trucking Co., Erie-Western Pennsyl-

brief will address the impact of all settlements on the questions presented. The short answer is that the settlements have *no* impact on the questions presented because each of the legal issues presented by the petition remains alive and appropriate for review by this Court.

1. The first issue presented by the petition is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), holding that tariff rates cannot give rise to antitrust injury, is inapplicable to treble damage claims by shippers when tariff rates are the primary but not the exclusive means of precluding market entry, and altogether inapplicable when competitors of the defendant, rather than shippers, are the antitrust plaintiffs. See Pet. 10-19. Both aspects of the *Keogh* issue continue to be presented by this case as it applies to the remaining respondents.

The remaining respondents include both shippers and competitors whose damage awards would be reversed under a proper interpretation of *Keogh*. Respondents Wheeling-Pittsburgh Steel Corp., National Steel Corp., and Sharon Steel Corp., who were shippers on the railroads, have damage awards in their favor that total in excess of $167 million. See Republic Opp. 65A-67A. Those awards would be reversed in their entirety were this Court to reject the Third Circuit's unwarranted exception to *Keogh*—as applied to shippers—for conspiracies to exclude competitors.

Moreover, respondent Tauro Brothers Trucking Co. was awarded $11.4 million as a competitor of the railroads. See *id.* at 70A. Tauro's award would be reversed in its entirety were this Court to adopt the approach taken by the Sixth Circuit in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.),

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vania Port Authority, and Codan Corp. settling all of their claims. On December 17, 1993, a stipulation was filed with this Court as part of that settlement. No further settlements between petitioner and the remaining six respondents have occurred.

cert. denied, 488 U.S. 880 (1988), and hold that *Keogh* bars rate-related claims brought by competitors.

Respondents Wills Trucking, Inc., and Toledo World Terminals, Inc., likewise can claim damages in excess of $1 only by showing that a particular rate would have been established in a tariff for shipments of iron ore from the dock they proposed to purchase or lease.[3] But that claim is manifestly rate-related, and thus any holding by this Court that rate-related activities must be excised from the damages calculation would undermine Wills' claim as well.[4]

2. The second issue presented by the petition is whether an antitrust plaintiff that is an indirect purchaser under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), may nonetheless recover treble damages if it asserts standing under the balancing approach set forth in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). See Pet. 19-30. This issue, too, is unaffected by the settlements.

After the settlements, all pass-on theories under which the steel company respondents recovered damages remain at issue in this case. Respondent Wheeling-Pittsburgh was awarded $37 million based on the amount it would have saved in payments to *vessel* companies for lake transportation. See Republic Opp. 65A. The court of appeals acknowledged that Wheeling-Pittsburgh was an indirect purchaser as to these damages (Pet. App. 50a),

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[3] These respondents argued to the jury that they were damaged by the absence of a competitive linehaul rate for hauling iron ore from a dock which they were able to purchase in 1975. *E.g.*, Tr. 1913-14 (July 11, 1989).

[4] National Steel's claims implicate both prongs of the Third Circuit's *Keogh* ruling because it "operated its own self-unloading vessel" and thus sought and was awarded damages in part as a "competitor." Pet. App. 29a n.4. But also during the relevant period, National was a shipper and at trial it sought and was awarded damages for excessive dock handling charges.

and respondents did not contend otherwise in their Opposition. Respondents Wheeling-Pittsburgh, National Steel, and Sharon Steel likewise were indirect purchasers as to the $50.9 million in damages they were awarded for the amounts they would have saved in payments to private docks. See Republic Opp. 65A-67A. Moreover, National Steel's and Wheeling-Pittsburgh's other damage awards, totalling $78.5 million (see *id.* at 65A-66A), depend upon being charged lower dock handling charges by private docks and lower prices by shipbuilders, and consequently those awards are also barred under *Illinois Brick*. Were this Court to reject the Third Circuit's holding that the *AGC* standing inquiry supersedes the indirect purchaser rule of *Illinois Brick*, these pass-on damage awards would be reversed.

3. Because both legal questions presented in the petition are still at issue among the remaining parties, the only consequences of the settlements involve matters unrelated to the questions presented in the petition. The settlements reduce the number of respondents before the Court and reduce the total amount of the jury's award remaining at issue. All of the reasons for granting the petition—namely, the striking conflicts among the courts of appeals concerning application of both the *Keogh* and *Illinois Brick* doctrines, the Third Circuit's unprecedented and unwarranted conclusion that the standing analysis of *AGC* supersedes the indirect purchaser rule of *Illinois Brick*, and the importance of these issues to the railroad industry, as well as to other regulated industries—remain as compelling after the settlements as they were before. Moreover, the reduction in the number of respondents will simplify the presentation of the issues to the Court and reduce the number of briefs that will be filed. Thus, that consequence should make this case an even more attractive vehicle for resolving the circuit conflicts identified in the petition.

Likewise, the remaining amount at stake—approximately $200 million (including interest and attorneys fees)—is a large sum that exceeds what this Court previously has expressly identified is sufficient by itself to warrant review by certiorari. See *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983) ("the damages claimed in this suit alone may amount to $100 million"); *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977) ("substantially more than $100 million is in dispute"). In addition, a decision by this Court would affect far more than $200 million, both because respondent Wills has been granted a new trial in which it will seek damages in excess of $22 million (pretrebling) and because other plaintiffs have filed actions seeking hundreds of millions in damages arising out of the same occurrences. *Armco Steel Co.* v. *CSX Corp.*, No. 93040613 (C.P. Butler County, Ohio filed April 30, 1993); *Pacific Great Lakes Corp.* v. *Bessemer & Lake Erie R.R.*, No. 189590 (C.P. Cuyahoga County, Ohio filed May 9, 1990). Those latter cases would be dramatically and directly affected by the holding of this Court on both issues presented because the *Keogh* doctrine preempts state law and Ohio antitrust law incorporates the limitations of *Illinois Brick* on indirect purchaser claims.

The Third Circuit's decision in this case is unprecedented both in its contorted interpretations of § 4 of the Clayton Act and in the size of the judgment it affirmed. The decision's status as binding precedent in the Third Circuit, the multiple conflicts among the circuits it creates and worsens, and the importance of the issues presented in the petition are wholly unaffected by the settlements. Review by this Court therefore is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

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January 12, 1993

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS TOLEDO WORLD TERMINAL, INC. AND WILLS TRUCKING, INC.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS TOLEDO WORLD TERMINAL, INC. AND WILLS TRUCKING, INC.

Respondents Toledo World Terminal, Inc. ("Wills dock") and Wills Trucking, Inc. (collectively "Wills respondents") submit this supplemental brief as directed by Supreme Court Order dated Monday, December 13, 1993, to address the impact of settlements made by Petitioner Bessemer & Lake Erie Railroad Company ("B&LE") with Republic Steel Corporation (D.C. Civil No. 84-02079) and Jones & Laughlin Steel Inc. (D.C. Civil No. 84-02135) on the questions presented for a writ of certiorari. Furthermore, B&LE has since settled with C.D. Ambrosia Trucking Company (D.C. Civil No. 84-02012) and Erie-Western Port Authority and Codan Corporation ("Erie-Codan"; D.C. Civil No. 84-05760), and this supplemental brief also addresses the impact of the more recent settlements.

Petitioner B&LE presented only the *Keogh*[1] question for review in relation to the Wills respondents' case.

[1] *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

B&LE raises the issues of whether *Keogh* is applicable under two situations—1) "where tariff rates are the primary . . . means of precluding market entry by competitors, and [2)] where competitors of the defendant, rather than shippers, are the antitrust plaintiffs." Pet. (i). Wills respondents are competitors to the railroads for dock-handling services and for the inland trucking of ore. However, B&LE's "competitor" arguments are only relevant if there is a rate-based injury that would otherwise be barred under the *Keogh* doctrine. Settlement of the Erie-Codan dock case removed the guise of "rate-relatedness" relied upon by B&LE, making its competitor arguments wholly insupportable under the facts remaining before the Court.

Dock Competitors

B&LE's claim that the decision below "unquestionably conflicts with the Sixth Circuit's holding in *Pinney Dock* [2] on identical facts" (Pet. 9) rested exclusively on the allegations, trial evidence, and special jury verdict applicable to the Erie-Codan dock case. Settlement of the Erie-Codan dock case removed any "conflict," and thus removed the core reason B&LE requested review of the Third Circuit's application of the *Keogh* doctrine.

The Erie-Codan Complaint presented the allegation that B&LE and its co-conspirators had "conspired to maintain unjustifiably high rates for the transportation of iron ore." [3] Erie-Codan presented evidence at trial that established the railroads' concerted refusal to provide a competitive rail service from its dock,[4] which resulted in a liability jury verdict finding Erie-Codan's injury to have been caused, in part, from B&LE's actions "to prevent Erie from having competitive iron ore rates at the Erie ore dock[.]" C.A. App. 1987. These facts are no longer before the Court. In contrast, the Wills dock case (the

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[2] *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), *cert. denied*, 488 U.S. 880 (1988).

[3] *See* C.A. App. 189 ¶ 49.

[4] *See* Erie-Codan Br. in Opp. 5 and referencing C.A. App. 6527, 6535, 6876, 6895, 7994 and 8256.

only remaining dock case) alleged, established at trial, and received a jury verdict specifically finding injury caused solely through "the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio." C.A. App. 443, 3437-60, and 1900, respectively.

The Sixth Circuit, in *Pinney Dock,* recognized that allegations of the railroads' refusal to extend commodity line-haul rates were clearly distinguishable from allegations of the railroads' concerted refusal to sell or lease dock properties. The Sixth Circuit found *Keogh* an applicable bar to claims having been caused by the railroads "refusing to grant nonrailroad owned docks, such as Pinney, a competitive rail rate (i.e., a commodity line-haul rate) . . ." but also clearly recognized that *Keogh* did not apply to the railroads' non-rate-related activities, holding "that the defendants' refus[al] to permit Litton to purchase, lease or use dock facilities" was "outside the scope of the *Keogh* doctrine." *Pinney Dock* at 1457. Wills' injuries resulted from the railroads' "refusal to lease or sell dock properties," and therefore, *Pinney Dock* and the Wills dock case uniformly find that concerted refusals to sell or lease dock properties constitute non-rate activities well outside the scope of the *Keogh* doctrine, and settlement of the Erie-Codan dock case removes B&LE's ability to camouflage the complete uniformity of *Pinney Dock* with the only dock case remaining before the Court.

Unlike Erie-Codan, the docks Wills attempted to lease or purchase had the commodity line-haul rate, not the class rate, making the concerted refusal to permit the lease or purchase of the dock properities crucial to the success of the conspiracy's goals—i.e., thwarting competition. Wills' Br. in Opp. 5-7. Despite the variance in methods used by the railroads to inflict injury on the Erie-Codan and Wills respondents, Petitioner B&LE repeatedly characterizes all private dock claims as having been based on the refusal to extend commodity line-haul rates, and thus forcing private docks to pay the higher, less competitive,

class rate. Pet. 4, 5, 6, 9, 11, 14 n.9, 15. *Settlement of the Erie-Codan case leaves B&LE with no factual basis for its argument.*

B&LE unambiguously admitted that the Wills respondents' claims were not of a rate-related nature in the Third Circuit Court of Appeals below. B&LE App. Br. 14. Further, B&LE's reply brief to this Court likewise admits the Wills respondents' claims are outside the scope of *Keogh*.[5] Once B&LE's arguments pertaining to the Erie-Codan facts are stripped from its brief, B&LE is left without any rate-related facts to support its *Keogh* argument.

Trucking Competitors

B&LE argues that the "competitor's rate-based claims" were the "primary," "core," and "dominant" means of causing injury to the competitor respondents. Pet. 10, i, 5, 9, respectively. However, the entire record contains not one example of a rate-based claim alleged by a trucking competitor. In fact, B&LE never mentions trucking claims in its analysis of "competitor" claims. *See* Pet. 16-18. Instead, B&LE argues only that this Court previously ruled "that *Keogh* also applied to the State's parens patriae claim on behalf of its ports, which, like the dock plaintiffs here, claimed that filed rates caused them injury . . ." Pet.

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[5] B&LE Reply Br. n.1 states: "Of course, the disposition of the Wills' claims proves Petitioner's argument that rates were the sole means of injuring respondents: Wills claimed injury only from the railroads' refusal to sell or lease dock property, and the jury awarded Wills only one dollar." B&LE again admits in a backhanded way that the Wills respondents' claims are not rate-related, yet, B&LE continues to seek review of the Wills respondents' case solely on the theory that its claims are rate-related and thus barred by the *Keogh* doctrine. Furthermore, B&LE's opening brief sets forth the three "nefarious means" used to carry out the conspiracy, the third being the railroads "concertedly refusing to make dock property available for use by private docks." Pet. 11 and quoting the Third Circuit Court of Appeal's opinion at 998 F.2d at 1168. B&LE indirectly admits the third means—the refusal to sell or lease dock property—is not a rate-related activity by stating: "The first two of these 'means' indisputably involved the rates filed in tariffs with the ICC." Pet. 11.

16-17. Here again, B&LE relies exclusively on Erie-Codan facts to make its argument. In the absence of Erie-Codan, B&LE's "competitor rate-based claims" argument is a hollow shell. There is not one aspect of rate-based activity remaining before the Court.

B&LE never created a factual record in regard to trucking claims from which to make an argument in support of the competitor issue it presents. Wills Trucking, Inc. established at trial that it had the authorities (C.A. App. 3464-69, 6436, 10444, 7152-53, 6649-50, 7710-12, 7716-31, 7888-7906, 7794-7824), and the rates (C.A. App. 7475-79) to move Armco's ore. B&LE never refuted or contradicted this evidence in any way, and now has attempted to sweep all "competitors" into the rate-related facts of the Erie-Codan dock case.

CONCLUSION

B&LE did not address its *Illinois Brick* argument to the Wills respondents, and settlement of the Erie-Codan case leaves B&LE with no basis for its claim that the decision below "conflicts with the Sixth Circuit's holding in *Pinney Dock* on identical facts . . ." (Pet. 9), thus removing its main reason for seeking review of the Third Circuit's application of the *Keogh* doctrine. B&LE's "competitor" argument simply no longer exists without the Erie-Codan dock case before the Court. For these reasons, B&LE's Petition for Certiorari should be denied.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS WHEELING-PITTSBURGH STEEL CORPORATION, SHARON STEEL CORPORATION AND TAURO BROTHERS TRUCKING COMPANY

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SUPPLEMENTAL BRIEF FOR RESPONDENTS WHEELING-PITTSBURGH STEEL CORPORATION, SHARON STEEL CORPORATION AND TAURO BROTHERS TRUCKING COMPANY

In compliance with this Court's order of December 13, 1993, steel company respondents Wheeling-Pittsburgh and Sharon and trucking company respondent Tauro submit this brief addressing petitioner's settlements with four other respondents that resolve the vast majority of the outstanding judgments in these consolidated cases. This Court's review was not warranted even before the settlements were announced. By removing parties that were the focus of the Third Circuit's opinion and the petition, the settlements make these cases a far less appropriate candidate for certiorari today:

- The principal respondents have been dismissed, and the individual claims of the remaining respondents present

fact patterns distinct from those addressed by the courts below.

- In contrast to the settling respondents, whose judgments were awarded largely under federal antitrust law, the majority of the actual damages granted to the remaining respondents were awarded under state law.

- The only respondent (Erie/Codan) whose claims were even arguably based on rates has been dismissed.

- This Court just recently denied certiorari on the question whether *Keogh* bars claims by competitors, one of the same questions petitioner raises here.

- The claims of the settling respondents accounted for approximately three-fourths of the outstanding judgments.

When the petition was filed on October 25, 1993, petitioner challenged judgments aggregating $497.4 million in favor of eight plaintiffs.[1] Petitioner has repeatedly headlined the amount of its liability as a justification for certiorari, referring more than a dozen times to the supposedly "unprecedented award" that "now exceeds $660 million-- more than double the largest judgment previously affirmed in a federal antitrust case." Pet. 1. *See id.* at 2, 6, 7, 10, 15, 16, 18, 22, 30; Pet. Reply Br. 1, 6.[2] Petitioner's settlements eviscerate its reliance on the size of the judgments as a springboard for certiorari.

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1 The petition also sought review of the interlocutory decision on liability entered in favor of respondent Wills (Wills Trucking, Inc. and Toledo World Terminal, Inc.). The court of appeals remanded Wills' claims for a new trial on damages.

2 The substantial discrepancy between the amounts of the judgments and the figures petitioner recites apparently arises from petitioner's addition of post-judgment interest in an effort to magnify the supposed importance of this case. The petition raises no legal issue as to the calculation of interest.

On November 30, 1993, petitioner announced that it had reached an agreement to settle the claims of respondents Republic Steel Corporation (Republic) and Jones & Laughlin Steel Incorporated (J&L) for $375 million. That settlement exceeds by almost $20 million the judgments entered in favor of Republic and J&L.[3] On December 10, 1993, the petition was dismissed under Supreme Court Rule 46.1 as to respondents Republic and J&L, pursuant to a stipulation dated December 9, 1993.

On December 10, 1993, petitioner reached an agreement settling the claims of two other respondents, C.D. Ambrosia Trucking Company (Ambrosia), and Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie/Codan). The amounts of these settlements have not been disclosed, but the judgments in favor of Ambrosia and Erie/Codan aggregated $13.9 million. CA App. 2202-03. On December 17, 1993, the petition was dismissed under Rule 46.1 as to those respondents, pursuant to a stipulation dated December 17, 1993.

The effect of the four settlements is to remove from the case: (1) approximately three-fourths of the outstanding judgments and an even higher percentage of the damages awarded under federal law; (2) the leading steel (Republic and J&L), dock (Erie/Codan) and trucking (Ambrosia) plaintiffs; (3) the only respondent (Erie/Codan) whose damages were even arguably based on rates; and (4) the respondents against whom petitioner's evidence and arguments have been and are principally directed. The settlements significantly alter the essential fact pattern considered by the courts below, leaving only disparate fragments of that mosaic for this Court's review. In the Third Circuit, petitioner's arguments targeted the main steel company and dock plaintiffs, *viz.*, settling respondents Republic, J&L and Erie/Codan. The Third Circuit

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[3] The district court entered separate judgments in the amounts of $197.6 and $158.3 million in favor of Republic and J&L, respectively, for a total of $355.9 million. CA App. 2196-97.

accordingly addressed the issues in the context of those plaintiffs, not in the very different posture that now exists as a result of the post-petition settlements. Any contention by petitioner that the settlements do not weigh heavily against review would simply reflect that the petition is not anchored in the record.

Federal antitrust claims dominated the judgments obtained by the settling respondents; the claims of the remaining respondents are more rooted in state law. In the aggregate, 77% of the judgments entered for the settling respondents were awarded under federal law. Republic obtained the largest judgment in the case, approximately 85% of it under federal law. Ambrosia's damage award was 100% under federal law; state law played no role whatsoever. Those respondents have now been dismissed pursuant to settlement. In contrast, more than half (56.9%) of the single damages awarded to the remaining steel company respondents were granted under Ohio's Valentine Act; and the percentage of state law claims ranges as high as 72.5% for Sharon, one of the remaining steel company respondents. The fundamental nature of the case has thus been transformed from the federal law issues addressed by the Third Circuit and the petition, to predominantly state law claims. Because petitioner failed to raise the state law context of the issues in the court of appeals or in its petition for certiorari, the questions that exist in the post-settlement configuration of the case are not fairly included in the questions presented for review. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

Other differences distinguish the remaining respondents from those petitioner has dismissed. Contrary to petitioner's undifferentiated attack on "steel company" claims, the claims of the three remaining steel company respondents differ in material ways from the claims that have been settled. For example, petitioner contends that the "steel companies" were indirect purchasers and suffered no antitrust injury. Pet. 22. But petitioner never advanced that

argument against respondent National, a steel company that prevailed on damage claims wholly distinct from the claims of settling steel company respondents Republic and J&L. At trial, National neither sought nor obtained self-unloader damages; it was awarded damages for savings it would have realized in operating its own fleet of vessels. Republic Br. in Opp. 53A. Petitioner's arguments are similarly misdirected against respondent Sharon, which did not obtain compensatory damages on its self-unloader claims and which recovered largely under state law. *Id.* at 67A.

Respondent Wheeling-Pittsburgh also sought damages based on facts distinct from the paradigm set forth in the petition. For example, petitioner attacks as "indirect" the so-called "passed on" savings that "steel companies" would have realized on handling services provided by non-railroad entities. Aside from the fact that petitioner's argument grossly mischaracterizes the Third Circuit's opinion, the argument has no bearing whatever on Wheeling-Pittsburgh's dock-handling damages, which were based entirely on iron ore that was actually handled at docks owned or controlled by the defendant railroads. Unlike Republic and J&L, Wheeling-Pittsburgh neither sought nor obtained damages for iron ore handled at a non-railroad dock. CA App. 10,431. In addition, Wheeling-Pittsburgh was the only plaintiff awarded damages for demurrage claims, and the petition neither challenges, nor even mentions, those claims. *See* Republic Br. in Opp. App. 65A.

As the briefs in opposition explained, petitioner's antitrust standing argument did not warrant certiorari even when Republic and J&L -- the principal targets of that argument and the focus of the Third Circuit's analysis -- were in the case. With the dismissal of the petition as to Republic and J&L, no residual issue of antitrust standing merits this Court's review.

The same is true for petitioner's *Keogh* arguments. As the briefs in opposition noted, the *Keogh* issues set forth in the petition are simply not presented on the record in this

case. The district court dismissed prior to trial the "rate-related" claims attacked in the petition,[4] the jury was instructed that liability could not be imposed for rate-related conduct, and the jury expressly found in answers to special interrogatories as to each respondent now remaining in the case that antitrust injury was caused by non-rate conduct. *See id.* at 52A-54A, 58A-59A.[5] Based on this record, the court of appeals correctly concluded that respondents "proved at trial an antitrust conspiracy that was not rooted in rate-related claims." Pet. App. 34a.

In an effort to manufacture an issue for this Court's review, petitioner distorts this record, clinging instead to the view that "rates were the sole cause of the damages claimed by the respondents." Pet. Reply Br. 1. Petitioner seeks to relitigate in this Court the factual issue of causation that it lost before two juries, the district court on JNOV, and the court of appeals. Petitioner also clings to the argument that the Third Circuit regarded rates as "the primary cause" of injury. *Id.* That plainly mischaracterizes the Third Circuit's analysis of the *Keogh* issues. As petitioner's reply brief acknowledges, the language it targets is culled from the court of appeals' discussion of "non-*Keogh* issues." *Id.* at 2. Petitioner attempts to craft a *Keogh* issue for purposes of certiorari out of snippets from non-pertinent portions of the appellate opinion.

The departure of settling respondent Erie/Codan further alters the case with respect to petitioner's *Keogh* argument. Erie/Codan was the only respondent as to which the record permitted any argument that the railroads' collective denial of commodity line haul rates to private docks was a cause of antitrust injury. The liability jury answered a special

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4 Petitioner continues to rely on dismissed claims. *See* Pet. Reply Br. 7 n.8 (quoting district court order dismissing rate-related claims).

5 Petitioner contends, without citation, that the jury was permitted to impose liability for joint ratesetting. Pet. Reply Br. 4 n.5. The jury was repeatedly instructed and explicitly found to the contrary. CA App. 4971, 4978, 4981, 5029-30. *See* Republic Br. in Opp. 10.

interrogatory finding that the injury suffered by Erie/Codan resulted in part from "acts to prevent Erie from having competitive iron ore rail rates at the Erie ore dock." Republic Br. in Opp. App. 56A. No such finding was made as to any remaining respondent. As to each remaining respondent, the jury expressly found that antitrust injury resulted from non-rate conduct. *See id.* at 52A (Wheeling-Pittsburgh), 53A (National), 54A (Sharon), 58A (Tauro), 59A (Wills).[6]

The absence of respondent Erie/Codan also has a profound effect on the second *Keogh* issue addressed in the petition: whether claims by competitors are barred. Erie/Codan was the only successful plaintiff that directly competed with the railroads in providing dock-handling services. Remaining respondent Tauro is a trucking company that provided land transportation, not docking services, and no steel company plaintiff was awarded damages for trucking claims. Wills' claims have been remanded for a new trial on damages.

Subsequent to the filing of the petition and the briefs in opposition, this Court denied certiorari on precisely the question presented in this case: whether *Keogh* should be expanded to bar claims of competitors. *Lifschultz Fast*

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[6] Just as the court below rejected petitioner's characterization of the facts, the District of Columbia Circuit in the criminal case also rejected B&LE's effort to masquerade unlawful non-rate conduct as "rate-related." *United States v. Bessemer & Lake Erie R.R.*, 717 F.2d 593, 601 (D.C. Cir. 1983). Contrary to petitioner's contention that the District of Columbia Circuit had no reason to consider "the extent to which the defendants effectuated their conspiracy through tariffed rates" (Pet. Reply Br. 2 n.3), B&LE's appellate briefs in the criminal case repeatedly stressed that very point. *See, e.g.*, Brief for Appellant B&LE, No. 82-2065 (D.C. Cir.) at 13 ("the indictment is predicated upon alleged rate activity"), 18 (the indictment "challenges not merely the . . . dock handling charges, but also the level of the charges as applied to self-unloading vessels"), 25 & n.29 ("the indictment involves a direct challenge to collective railroad rate activity"); Reply Brief for Appellant BL&E, No. 82-2065 (D.C. Cir.) at 4 ("rate action which forms the heart of the indictment"), 23 ("principal allegations in the indictment" challenged rate conduct; "government's attack on the substance of particular railroad rates and charges"). Both the District of Columbia Circuit and the Third Circuit saw through the transparently false version of the facts petitioner asserts once again in this Court.

Freight, Inc. v. Consolidated Freightways Corp., No. 93-549, *cert. denied*, Nov. 29, 1993. This case is less worthy of review than was *Lifschultz*. First, the claims in *Lifschultz* arguably challenged filed rates so the case at least included *Keogh*-type claims; this case does not include such claims. Second, the claims in *Lifschultz* involved conduct that occurred following the deregulation of motor carrier transportation in 1980. *See* 805 F. Supp. 1277, 1288 (D.S.C. 1992). This case was decided solely on the basis of the superseded regulatory regime that existed before it was drastically altered by Congress and the Interstate Commerce Commission; this case is a relic of a long bygone era in federal transportation regulation. Since the damages period for the state law claims -- which now predominate -- ended in 1977, the case is today even more of an anachronism that it was when the petition was filed.

Petitioner asserts that this Court has addressed the filed-rate doctrine in several cases over the past few years. Pet. Reply Br. 6 n.7. But all of those cases, unlike this one, arose under the present statutory and regulatory schemes and therefore buttress the conclusion that review should be denied here.

For the reasons stated above and in the briefs in opposition, the petition for a writ of certiorari should be denied.

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